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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE, PETITIONER,

vs.

STATE OF GEORGIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

PETITION FOR CERTIORARI FILED APRIL 13, 1955

CERTIORARI GRANTED MAY 31, 1955

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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VS.

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INDEX

	Original	Print
Record from the Superior Court of Cobb County	1	1
Motion to quash indictment, Case No. 18553	1	1
Order overruling motion to quash indictment, Case No. 18553	5	4
Submission of motion to quash	6	4
Transcript of evidence on the motion to quash the indictment	7	4
Testimony of Ed Austin	7	4
Ty Terry	8	5
John T. Leeroy	13	8
Hezekiah Clements	15	10
Sam Drew	16	11
Frank Addison	18	12
John J. Hill	20	13
Offer in evidence	22	15
Proceedings in the Supreme Court of Georgia	24	16
Syllabus opinion, Chandler, J. (Case No. 18553)	24	16
Record from the Superior Court of Cobb County, Case No. 18780	27	18
Special plea in abatement	27	18
Demurrer to defendant's special plea in abatement	35	23
Judgment and order of court sustaining demurrer	38	26
Proceedings in the Supreme Court of Georgia	39	26
Syllabus opinion, Duckworth, J. (Case No. 18780)	39	26
Order allowing certiorari	42	28

1

In the Superior Court of Cobb County

INDICTMENT No. (1961)

RAPE

THE STATE

vs.

AMOS REECE

MOTION TO QUASH INDICTMENT—Filed October 30, 1953

GEORGIA, COBB COUNTY:

To the Superior Court of said State and County:

Now comes AMOS REECE, the defendant in the above entitled indictment, and, through his attorneys, moves this Court to quash the indictment herein upon the following grounds, to-wit:

1

The movant, AMOS REECE, is a male person 28 years of age and is a member of the Negro race.

2

The movant was indicted by the Grand Jury of Cobb County, Georgia, in the above entitled case, the same being a felony.

3

That the trial of the movant is set for the 30th day in October 1953, in Cobb County, Georgia, in the Superior Court of said county and state, and that if upon said trial the movant is convicted on said indictment, under the laws of the State of Georgia, he can be hanged, electrocuted, or put to death in any of the ways authorized by the law to do so, the said indictment charging the movant with the commission of a capital felony.

4

That according to the United States census of 1950 there were approximately 55,606 members of the white race and 6,224 members of the negro race who lived in said county, according to the 1951 addition of the Statistical Abstract of the State of Georgia.

That there were 16,201 male white citizens 21 years of age

2 and older, and 1,710 male negro citizens 21 years of age and older in the said County, according to U. S. Census, 1950.

5

That the Grand Jury which indicted the movant was composed of persons whose names appeared in the Grand Jury Box of said County, and that the names appearing in said Grand Jury Box were placed therein by the Jury Commissioners of said County in accordance with the Georgia Statutes.

6

That the number of names appearing on the Grand Jury list of said County is 534, and that all of the said names appearing on said list are the names of persons who are members of the white race except 6 names of members of the negro race although there are those other persons of the negro race who would be otherwise qualified to serve in the capacity of Grand Jurors; that the negro men whose names do appear thereon are well known by all those who draw the panel of Grand Jurors.

7

That for more than 18 years no member of the negro race has served on the Grand Jury of said County.

8

That petitioner has reason to believe that the name of no member of the negro race has been in the Grand Jury Box of said County, unless it was notoriously known to be such.

9

That there are 1108 citizens of the negro race of said County whose names are on the books of the Tax Receiver of said County, but whose names appear in said books on special pages and in separate sections or separate books apart from the tax payers of the white race, and whose names are designated "colored" by the tax commissioner.

3 10

That the names of all white citizens of said County who make tax returns are maintained in books containing white paper, and in separate sections of the tax books.

11

That there are numerous citizens of said County who are members of the negro race who are competent and qualified jurors as to

age, experience, intelligence, and uprightness, and who are legally qualified to act as Grand Jurors, but the names of these persons have been purposely and expressly excluded from said Jury Boxes solely on account of their being members of the negro race.

12

That the Grand Jury which returned a true bill of indictment against this movant was not made up of a jury of his peers selected from a true cross-section of said County's population.

13

That the Grand Jury which returned the true bill of indictment against movant consisted solely of members of the white race and that members of the negro race were purposely, systematically, unlawfully, and unconstitutionally excluded from service on said Grand Jury.

14

That the systematic and purposeful exclusion of negroes from the Grand Jury which indicted movant is a violation of the rights of movant under Article 1, Section 1, paragraph 3 of the Constitution of the State of Georgia, which is the "due process clause", is a violation of his rights under Article 1, Section 1, paragraph 25 of the Constitution of the State of Georgia, which is the "equal protection clause", and a violation of his rights under the 14th Amendment of the Constitution of the United States of America and of 8 U.S.C.A. paragraph 44.

15

That movant is informed and believes, and charges, that there has not been a negro to serve on the Grand Jury of said County for at least 18 years; that the officers of said County have systematically, purposefully, and unlawfully excluded members of the negro race from Grand Jury service during this period of time.

Wherefore, movant prays that the indictment herein returned against him be quashed, rendered null and void, and set aside and that he be granted such other and further relief as to this Court seems meet and proper.

GORDON M. COMBS
and
FRANK D. HOLCOMB,
Attorneys for Movant.

Duly sworn to by Amos Reece. Jurat omitted in printing.

5 In the Superior Court of Cobb County

ORDER OVERRULING MOTION—October 30, 1953

The within motion coming on before me to be heard and after hearing evidence under oath, it is considered, ordered and adjudged that the same be and is hereby overruled.

This 30th day of October, 1953.

JAS. T. MANNING,
J. S. C., C. J. C.

(File endorsement omitted)

6 SUBMISSION OF MOTION TO QUASH

Mr. COMBS: Now, your honor, we have another motion to make in this case, and Mr. Holcomb will present the motion. (Mr. Holcomb then read to the court the defendant's written motion to quash the indictment; and later offered in evidence in support of his motion the following testimony):

7 In Superior Court of Cobb County

TRANSCRIPT OF EVIDENCE ETC.

ED AUSTIN being duly sworn, testified as follows:

DIRECT EXAMINATION:

By Mr. COMBS:

Q. What is your name?
A. Ed Austin.
Q. Are you a member of the colored race?
A. Yes, sir.
Q. Where do you live?
A. At Acworth.
Q. Have you ever served on a grand jury in Cobb County?
A. No, sir.
Q. Acworth is in Cobb County?
A. I know it.
Q. And how many years have you lived there?
A. About thirty years.
Q. In Cobb County?
A. Yes, sir.

CROSS EXAMINATION.

By Mr. HAMES:

Q. How old are you?
A. I will be eighty-one years old the 27th day of November.
Q. You have a little trouble in hearing, don't you?
A. Well, I can hear very good.
Q. Have you been sick a little bit lately?
A. Yes, sir; I served nearly two months at Kennestone Hospital, had two serious operations.
Q. If you had been subpoenaed for grand jury service would you have been able to come?
A. No, sir.
Q. Would you have claimed your age as an exemption?
A. Well, my age would have been, but I have high blood-
8 pressure and a weak heart.
Q. You got a summons this week to serve on the jury, didn't you?
A. A man came to my home.
Q. You were summoned to come to court earlier this week?
A. No, sir, not this week; I think it was last week. I got my first one.
Q. As a juror?
A. As a juror.
Q. Now on that, would that be a summons as a witness in a case?
A. No, sir, for Cobb County grand jurymen.
Q. You were subpoenaed last week?
A. Or the week before one.
Q. And you claimed your exemption at that time and didn't come down here?
A. I got Mr. Homer Harrison to fill it out; I wasn't able to come.

TY TERRY being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. You are clerk of this court?
A. I am deputy clerk.
Q. Have you got a list of the grand jury selected by the jury commissioners?
A. Yes, sir.
Q. For what time?
A. The jury boxes were revised in 1952, the latter part of October.
Q. Are there any colored jurors on that list?
A. Yes, sir.

Q. Are they designated as colored jurors?
9 A. They are on the index.
Q. As colored jurors?
A. In this book as an index.
Q. How many are on the list?
A. Six.
Q. Will you call their names?
A. Frank Addison, of the Marietta District; Ed Austin, of the Acworth District; Willie M. Broadnax of McLand District; H. K. Clements, of the McLand District; Sam Drew, of Marietta, and John J. Hill, of the Marietta District.

CROSS EXAMINATION.

By Mr. HAMES:

Q. What connection do you have with the Board of Jury Commissioners?
A. Well, in the 1952 drawing or selection of the jury I was acting clerk.
Q. And you are today in that same capacity?
A. As far as I know, yes.
Q. When the petit jury was made up by the jury commissioners state how many petit jurors names were placed in the box, to your best recollection?
A. That I can't state. I can state this, to the best of my knowledge and belief that 10,115 names appeared on the tax digest, and the jury commissioners voted to put approximately twenty-five per cent of that number into the petit jury box.

Mr. COMBS: That is immaterial, and we move to exclude it.
Mr. HAMES: I think it is very material; I think I have
10 got to show how the books were made up.
The COURT: I overrule the objection; go ahead.

Q. Then roughly 2,500 names appear in the jury box?
A. I don't recall the number.
Q. Well, from what you said they voted to do, they took approximately 2,500, or twenty-five per cent of those names approximately to put in the petit jury box?
A. Yes, sir.
Q. In the making up of the 2,500 was there any further action taken with reference to the white and colored?
A. No distinction was made.
Q. Now of the list made out of the names, they made a list of all qualified jurors, a list of about 2,500?
A. That is correct.

Q. That list now, I will ask you whether there was any designation on that list of whether the person was white or colored?

A. No, sir.

Q. So when the jury box was made up and the names were selected and placed in the box there was no designation of the individual juror as to whether he was white or colored?

A. To the best of my knowledge I would say no.

Q. Have you since observed the calling of the jury by the judge of the superior court?

A. That I have.

Q. Have you seen any designation of the color of the man, either white or colored, as it is withdrawn from the jury box?

A. Definitely not.

Q. Now from the 2,500 that are in the petit jury box what
11 portion are called for the grand jury or grand jury service?

A. Well, that was brought up by some member of the jury commissioners, and it was unanimously agreed that they would take twenty-five per cent of the names in the petit jury box and place them in the grand jury box.

Q. Were those names taken from the same list by the jury commissioners or were they drawn from the box into the grand jury box, or was another list prepared showing the same names?

A. I don't recall exactly about that.

Q. I will ask you whether or not you observed there that there was any systematic exclusion of people from the jury box by reason of color?

A. No, sir.

Q. From your observation there was there any discrimination made by the grand jury commissioners or by the jury commissioners, were they concerned in any particular as to number and color, the number of colored or the number of whites?

Mr. COMBS: We made an attack on the grand jury list, we have made no attack on the petit jury, and we think that is irrelevant.

Mr. HAMES: From the petit jury list the grand jury list is taken.

The COURT: I overrule the objection.

Q. Was there any exclusion, any systematic effort, or any effort at all, on the part of the jury commissioners to exclude any person from the grand jury list by reason of color?

A. No, sir.

Q. Are you positive of that?

A. Yes, sir.

12 Q. Have there been members of the colored race called as grand jurors at this or any other term of this court?

A. I can't say about that.

Q. You don't know because the name is not designated and there is no indication to you whether the person is colored or not?
A. No, sir.
Q. So you can't know whether one has been called or not, can you?
A. No, sir.

By Mr. Combs:

Q. Why are there only six colored grand jurors on the list?
A. That I don't know. You will have to ask the jury commissioners.

By Mr. Hames:

Q. (Continuing). Was there any designation on the name of a juror that is placed upon the slip; is there any designation in color or anything else that would attract the attention, as to the various colors of the tickets that are in the jury box?
A. None whatsoever.
Q. There is no way of knowing, except by personally knowing the person whether or not he is colored or white?
A. That would be the only way.
Q. If Frank Addison, Ed Austin, Sam Drew, or Willie Broadnax or H. K. Clements had been called as petit jurors would there be any indication that their name was also in the grand jury box, or that they have to be on the petit jury at all before they can put it in the grand jury box?
A. Yes, sir.

Further direct examination.

By Mr. Combs:

Q. Have you ever known of a negro to serve on the grand jury?
13 A. Not to my personal knowledge.
Q. You always see the grand jurors as such since you have been acting here?
A. Where I am then employed.
Q. And you have never seen a negro on there?
A. Well, no sir.

John T. LeCroy being duly sworn, testified as follows:

Direct examination.

By Mr. Combs:

Q. You are the clerk of the superior court here?
A. Yes, sir.

Q. How long have you been connected with this court as clerk and deputy, either one?

A. Since May 1935.

Q. About eighteen years?

A. Yes, sir, eighteen years this past May.

Q. During that time to your knowledge has any negro ever served on the grand jury in this county?

A. No, sir, not to my knowledge.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. I will ask you whether or not the jury box has been revised?

A. Yes, sir, under the law the jury boxes are revised every two years.

Q. When was the last time that the jury box was revised in this county?

A. The jury commissioners began their work in August of 1952, and completed their work, as I recall it, around the first of October.

14 Q. I will ask you whether or not the revision has removed from the box or from the boxes any distinction as to the color or race of the members whose names are in the boxes?

A. No, sir, there isn't any; there is no distinction.

Q. Is that the revision that took place in 1952, that you described?

A. Yes, sir.

Q. Is there any systematic effort on the part of any one, either the court officials or the jury commissioners, to systematically exclude persons of the colored race from either the grand or the petit jury?

A. No, sir.

Q. Is there any designation, by color or otherwise, that would attract attention of either a jury reviser or any court official, that would point out to them the distinction in race?

A. No, sir, all the names are listed on the same sort of paper.

Q. Are you present when the court summons both grand and petit jurors?

A. Yes, sir, as a rule.

Q. Have you observed the slips as drawn from the grand jury and petit jury boxes?

A. Yes, sir.

Q. Is there anything there to indicate by color or anything else that would attract the court's attention at all, or the sheriff's attention to the fact that the person being summoned for grand jury or petit jury service was a white or colored person?

A. No, sir.

Q. Based upon the eighteen years time that you have served the court is there now in existence and being used there by either the jury commissioners or by any court official or any one else who has any portion or part of duty in performing any service in the selection, calling, summoning and empaneling or jurors any plan that is made for the purpose of excluding people of color from either grand or petit jury service?

A. Not to my knowledge, no sir.

RE-DIRECT EXAMINATION.

By Mr. COMBS:

Q. The jury commissioners do know their ages in their selection of them?

A. No, sir, they do not.

HEZEKIAH CLEMENTS being duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. COMBS:

Q. You are a member of the colored race?
A. Yes, sir.
Q. Have you ever served on the grand jury in this county?
A. Yes, sir.
Q. Do you live in this county?
A. No, sir.
Q. Where do you live?
A. Out here in Maclins District.
Q. How long have you lived there?
A. Since 1902.
Q. Fifty-one years?
A. Yes, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

16 Q. How old are you?
A. I am eighty years old.
Q. Are you a little hard of hearing?
A. Yes, sir.
Q. Would you serve as a grand juror if you were summoned, or would you claim your exemption under the law?
A. I don't know, I am mighty old to be serving on the grand jury; I never have.
Q. And you don't expect to?

A. No.

Q. And you would probably ask to be excused by the court if you were summoned as a grand juror?

A. I don't know, I expect I would.

FURTHER DIRECT EXAMINATION.

By Mr. COMBS:

Q. Do you know why they put your name in the grand jury box, and you being so old?

A. No, sir.

SAM DREW being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is Sam Drew?

A. Yes, sir.

Q. Do you live in this county?

A. Yes, sir.

Q. How long have you lived in this county?

A. About thirty-two years.

Q. How old are you?

A. I will be sixty-two.

17 Q. When were you born?

A. In 1892.

Q. Have you ever served on a grand jury in this county?

A. No, sir.

Q. Do you know other people who are qualified by—other colored people who are qualified by education, uprightness and intelligence in this county who have ever served on the grand jury?

A. No, sir.

Q. You don't know any?

A. Yes, sir, I know some that have not served.

Q. The ones that you know, are they upright men, colored men?

A. As far as know, I believe so.

Q. Are you so qualified by education to serve on the grand jury if called?

A. Yes, sir.

Q. Have you ever known any of them to serve on the grand jury?

A. No, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. You have been called up here in court lately, haven't you?

A. No, sir.

Q. You haven't been called for jury service?
A. Yes, sir, this year.
Q. Were you sworn and empaneled in court for that week?
A. No, sir, I got a subpoena.
Q. And did you ask to be excused?
A. Yes, sir.

18 FRANK ADDISON being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is Frank Addison?
A. Yes, sir.
Q. Are you a member of the colored race?
A. Yes, sir.
Q. Do you live in this county?
A. Yes, sir.
Q. How long have you lived in this county?
A. All my life.
Q. What is your age?
A. I am sixty-two.
Q. Have you ever served on the grand jury in this county?
A. No, sir.
Q. Do you know other people of your race who are upright and intelligent and who own property in this county——
A. No, sir.
Q. You don't know any upright people in this county?
A. Yes, sir, I know some of them.
Q. Upright, intelligent colored people?
A. Yes, sir.
Q. That are qualified to serve on the grand jury?
A. Yes, sir.
Q. Did you ever know any of them to serve on the grand jury?
A. No, sir.

CROSS-EXAMINATION.

By Mr. HAMES:

Q. You are a member of the present panel here in court, are you not?
19 A. Yes, sir.
Q. You were sworn Monday morning?
A. Yes, sir.
Q. And you are also the same Frank Addison whose name appears on the list of grand jurors of this county?

A. Yes, sir.

Q. And Hezekiah Clements and Ed Austin and Sam Drew and John J. Hill were on the list of grand jurors in this county?

A. Well, in the paper that I saw my name last week, where you all elected me, I didn't see no colored person but Ed Austin; that was the only name I saw of colored people; the paper said I was to report here on Monday morning, and in the meantime I got a card, and I looked at it and I reported here on Monday morning to the sheriff.

Q. Those people whose names I called are the same people whose names are on the grand jury list, that were read here a few minutes ago by Mr. Terry?

A. Yes, sir.

Q. And you were one of the grand jurors, on the grand jury list, were you not?

A. Yes, sir.

By Mr. COMBS:

Q. You never have served?

A. No, sir.

By Mr. HAMES:

Q. (Continuing). This is the first time you have been called since 1952 as a petit juror?

A. This is the first time I have ever been called in my life.

Q. Do you know when the last revision of the petit and grand jury list was made?

20 A. No, sir, I haven't been here for that.

Q. You don't know when it was made?

A. No, sir.

Q. You don't know when the revision was made in 1952 that there was no distinction made between the colored people and the white people as their names appeared on the grand and petit jury lists?

A. I don't know.

Q. Do you think you are being called as the result of that revision that has been made?

A. Yes, sir, I believe it is.

JOHN J. HILL being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. COMBS:

Q. Your name is John J. Hill?

A. Yes, sir.

Q. Do you live in Cobb County?
A. Yes, sir.
Q. How long have you lived here?
A. Fifty odd years.
Q. How old are you?
A. Sixty-two.
Q. Have you ever served on the grand jury in this county?
A. No, sir.
Q. In prior years on the grand jury?
A. No, sir.
Q. Did you ever know a colored person in this county, other colored people in the county, who are upright—do you know other upright colored people?
21 A. Yes, sir.
Q. And who are upright people?
A. Yes, sir.
Q. Do they own property?
A. Yes, sir.
Q. Did you ever know one of them to be called on the grand jury?
A. No, sir.

CROSS EXAMINATION.

By Mr. HAMES:

Q. You know a lot of white people sixty-five years old, around here? You have known a lot of white people in the 55 years that you have been around here?
A. Yes, sir.
Q. And who are honest, intelligent and upright white people?
A. Yes, sir.
Q. And you know a lot of them that haven't served on the grand jury too, don't you?
A. Yes, sir.
Q. And you are not contending that there was any unfair means used to exclude colored people of this county from the grand jury or the petit jury, are you?
A. I don't know of it.
Q. You were called as a juror at one term of the court here this year, weren't you?
A. Yes, sir.
Q. Which term of court was that?
A. It was the superior court, July or August.
Q. It was the August term of the court that you were up here, wasn't it?
22 A. Yes, sir.

OFFER IN EVIDENCE

Mr. COMBS: Now I tender in evidence here this census of the population of 1950, under the heading of Cobb County, which shows that a total of all classes over 21 years of age is thirty-six thousand. It shows male, white 16,201, and it shows non-white, male, 1710; we tender that in evidence in support of our motion.

Mr. HAMES: I object to that on the ground that there is no certification that this is a true and correct copy of the census, no certification shown by Congress; and we object to it for the further reason that in his plea and motion to quash he sets up the charge that negroes are being systematically excluded from the grand jury box, there being no showing as to what number of the non-whites are people of color or negroes, and we think this would have no bearing on the issue that he is talking about and that he is offering by his motion to quash; the designation of non-whites does not show how much would be negroes and how much would be of other races; and we object to it on the ground that it is not properly certified.

The COURT: I will overrule the objection, and admit it.

Mr. HAMES: I move now to exclude all testimony of the witnesses offered by the movant concerning the jury service of any person prior to 1952, and as to whether or not they have served, there having been conclusively shown a revision of the jury lists and in which the nature and operation of the selection and drawing and placing of the names in the boxes have been detailed, and there being no showing on the part of the movant that that system
23 as presently in existence, as testified to by his own witnesses is a system that systematically excludes jurors. I move to dismiss the challenge to the array for that purpose and upon those grounds.

The COURT: Do you wish to say anything further, Mr. Combs?

Mr. COMBS: I have no argument to make—just the facts.

The COURT: Does anybody else want to say anything else on either side on this motion to quash.

Mr. COMBS: Nothing further than the evidence.

The COURT: I overrule the motion to exclude the evidence that has been introduced. And you can take an order overruling the motion to quash the indictment; and also on the motion for a continuance.

The court then proceeded in the matter of the selection of the jury.

Mr. HAMES: By agreement between counsel for the state and the defendant the questions on the voir dire will be asked collectively of the jurors.

And after the selection of the jury the trial proceeded with the introduction of evidence.

24 In the Supreme Court of Georgia

Case No. 18553

REECE

v.

THE STATE

Submitted April 13, 1954 and Decided May 11, 1954

SYLLABUS OPINION BY THE COURT

CHANDLER, *Justice.*

Amos Reece was indicted for rape in Cobb County, and was convicted without any recommendation and sentenced to be electrocuted. Thereafter he filed a motion for a new trial on the usual general grounds, and later amended it by adding two special grounds. He excepted in due time to the denial of his amended motion for new trial, and assigns error on pendente lite exceptions to two antecedent rulings, one refusing to continue the case, and the other denying his motion to quash the indictment. *Held:*

1. When, as here, the accused has been arrested for the commission of a penal offense and is committed to jail, he is apprised of the fact that his case or the charge against him will undergo grand jury investigation, and it is incumbent upon him to raise objections to the competency of the grand jurors before they find an indictment against him. Such being the instant case, the court did not err in denying the motion to quash the indictment. See Turner v. State, 78 Ga. 174; Lascelles v. State, 90 Ga. 347, 372 (16 S.E. 945, 35 Am. St. R. 216); Parris v. State, 125 Ga. 777 (54 S.E. 751); Tucker v. State, 135 Ga. 79 (68 S.E. 786); Burns v. State, 191 Ga. 60, 64 (11 S.E. 2d 350); Harris v. State, 191 Ga. 243 (5), 249 (12 S.E. 2d 64). And this rule applies whether the accused had counsel before the indictment was returned against him or not. Tucker v. State, supra.

2. In the instant case the judge charged the jury: "Generally, with regard to the question of sanity or insanity at the time of the alleged act and the act alleged to be a crime, the true test
25 of sanity or insanity is as follows: The insanity which renders the perpetrator of a particular act which is criminal incapable of committing a crime is such as deprives him of his capacity to distinguish between right and wrong relative to such act. Mere feeble-

ness or weakness of mind is not sufficient to excuse a person from crime, provided the mind is still sufficient to distinguish between right and wrong with relation to the act charged." Subsequently, the judge gave this further instruction: "The law does not attempt to measure the degree of insanity which renders a man legally responsible for his acts. That is a question for the jury." To this latter instruction the defendant excepts on the ground that it is an abstractly incorrect statement of the law, in that the law does fix a degree of insanity with which a person may be afflicted and yet be legally responsible for his acts, and that the instruction complained of was inconsistent with and antagonistic to the charge set out above and tended to and did confuse and mislead the jury as to a material issue involved in movant's case. It is also alleged that the charge complained of left with the jury two distinct propositions of law directly antagonistic to and in conflict with each other, and that the excerpt complained of was not withdrawn by the judge anywhere in his charge. Since the trial judge had previously given a correct charge on the issue of insanity, we agree and hold that his further instruction on the question of criminal responsibility was misleading and confusing and therefore injurious to the accused. See, in this connection, Caison v. State, 171 Ga. 1 (154 S.E. 337); Geer v. State, 184 Ga. 805 (193 S. E. 776); and Bryant v. State, 191 Ga. 686 (13 S.E. 2d 820). In those three cases the trial judge had charged that the law does not attempt to measure the degree of insanity which renders a person irresponsible for his acts, and the cases were reversed by this court for the reason that the law does fix the degree of insanity which renders one irresponsible for his acts.

26 (a) Where the judge gives a correct instruction upon an issue involved in a criminal case,—as he did in this case by the instruction first quoted—and afterwards gives a further instruction upon the same issue, which is misleading and confusing to the jury, and fails to withdraw such further charge and call the jury's attention to its withdrawal, error results. That part of the charge here complained of was calculated to leave the jury in such a confused condition of mind that they could not render an intelligent verdict. See Morris v. Warlick, 118 Ga. 421 (2) (45 S.E. 407); Gill v. Willingham, 156 Ga. 728 (4) (120 S.E. 108).

3. Since the case will be remanded for another trial, it is unnecessary for us to consider the assignment of error complaining of the court's refusal to continue the case on the defendant's motion.

4. The other special ground of the motion for new trial complains of the admission of certain testimony over the defendant's objection. However, this ground has neither been argued in the brief filed for the plaintiff in error, nor otherwise insisted upon in this court, and will therefore be treated as abandoned. Rabun v. Wynn, 209 Ga. 80 (1) (70 S.E. 2d 745).

5. The evidence was amply sufficient to authorize the verdict, and the general grounds of the motion for new trial are accordingly without merit. However, for the reason stated in headnote 2 above, the trial judge erred in denying the motion for new trial as amended.

Judgment reversed. All the Justices concur, except DUCKWORTH, C. J., who dissents.

27 IN THE SUPERIOR COURT OF COBB COUNTY

THE STATE

vs.

AMOS REESE

Indictment No. 1961

SPECIAL PLEA IN ABATEMENT—Filed June 22, 1954

GEORGIA,
Cobb County.

To the Superior Court of said County:

Comes Now, AMOS REESE, the defendant in the above stated indictment, and through his attorney, and before pleading to the merits on said indictment, and without waiving his right to so plead, brings this his challenge to the entire array of jurors put upon him brings this his motion to quash the said indictment, brings this his motion to quash and nullify all the panels of the jurors put upon him; to quash nullify and render void the entire list of Grand Jurors, particularly the Grand Jury which returned said indictment, and to nullify and render void the appointment of the Jury Commission which selected the names of the persons whose names appear in the Grand Jury box and the Petit Jury box of said County, and for cause hereof shows:

1.

Movant, Amos Reese, is a male person, and is a member of the Negro race.

2.

The movant was indicted by the Grand Jury of Cobb County as the same was composed on October 23, 1953, for the offense of rape upon a white female person, the alleged offense having transpired on October 20, 1953.

3.

The indictment has been called for trial in said court for June 22, 1954, and an array of Petit Jurors has been drawn from the jury box, summoned to be in court, and the panels of jurors 28 are now completed and ready to be put upon the movant.

4.

The movant is a person of low mentality, is illiterate and at the time he was indicted by the said Grand Jury he was incarcerated in the common jail of Cobb County and had been for two days prior to said indictment, and had not conferred with an attorney and did not have the benefit of counsel. The movant at that time did not know the names of any individual who was on the Grand Jury at the October term of the Superior Court of Cobb County, in 1953. The movant did not know, and had not been informed, that the Jury Commission of said County which selected all persons whose names were placed in the Grand Jury box of said County was composed exclusively of male white persons. The movant did not know at the time of his aforesaid indictment that never in all the history of Cobb County had a member of his race been appointed by the Judge of the Superior Court of said county to be a member of said Jury Commission. Movant did not know, and had not been informed, that under the Constitution of the United States, the 14th Amendment thereof, that he was entitled to have the said offense for which he was indicted considered by a Grand Jury composed of persons from which members of the Negro race had not been systematically excluded by reason of their race and color, and that he was entitled under said Amendment of the Federal Constitution to have the offense for which he was indicted considered by a Grand Jury composed of members who had been drawn from the Grand Jury box which had been made and filled by a Jury Commission for which members of the Negro race had not been excluded solely because of their race and color.

29 5.

Movant shows that the Grand Jury list and the Petit Jury list are compiled by a Board of Commissioners, which said Board is composed of six discreet persons who are not practicing attorneys at law nor County officers and that they are appointed for a term of six years by the Judge of the Superior Court. He shows that the said Jury Commissioners select from the books of the Tax Receiver the persons to serve as both Grand Jurors and Petit Jurors.

6.

Movant shows that no person who is drawn as a Grand Juror shall be called during the same term as a Traverse or Petit Juror.

7.

Movant shows that there are in Cobb County, Georgia, according to the 1950 U. S. Census 16,201 White male citizens twenty-one years old and older, and that there are 1,710 Negro male citizens twenty-one years old and older. Movant shows that there were selected by the aforesaid Jury Commission of Cobb County the names of 2,500 persons and that the said 2,500 names appear in the Traverse Jury box of said county. Movant shows that 25% of the aforesaid 2,500 names which appear in the Traverse Jury box of said county appear in the Grand Jury box of said county. Movant shows that the aforesaid Jury Commission selected six persons who are members of the Negro race and placed the names of the aforesaid six persons in the Traverse Jury box of said county and in the Grand Jury box of said county. Movant shows that the six persons whose names appear in the Grand Jury box of said county are the names of the identical persons whose names appear in the Traverse Jury box of said county. Movant shows that three of the names of the Negro persons whose names appear in both the Grand Jury box and the Petit Jury Box of said county are eighty years of age and older. Movant shows that there are a large number of Negro citizens in Cobb County, Georgia, who are upright intelligent and discreet persons, and whose names appear on the books of the Tax Receiver of said county.

8.

Movant shows that there has never been a member of the Negro race selected to serve on the Board of Jury Commissioners of Cobb County, Georgia. He shows that there are at least 100 citizens of said county who are members of the Negro race who are discreet, competent and qualified as to age, experience, intelligence and uprightness to act as Jury Commissioner of said County, but that notwithstanding this fact members of the Negro race have been systematically and purposely excluded from service on the Board of Jury Commissioners solely on account of their being members of the Negro race.

9.

Movant shows that the systematic and purposeful exclusion of Negroes from the Board of Jury Commission of said county is a violation of the rights of the movant under Article 1, Section 1, paragraph 3 of the Constitution of Georgia, and is a violation of his rights under Article 1, Section 1, paragraph 25 of the Constitution of Georgia, and is contrary to the 14th Amendment of the Constitution of the United States.

10.

Movant shows that the entire list of Petit Jurors and Grand Jurors as selected by said illegal and void Jury Commission of said County is tainted with illegality because the said list of Grand Jurors and Petit Jurors and the names of all persons whose names appear in the Grand Jury box and in the Traverse Jury box were selected and made up by a Jury Commission which existed
31 in contravention of the 14th Amendment of the Constitution of the United States; and that said Grand Jury box and Traverse Jury box, as the same is now constituted in the aforesaid County, is illegal and void as to the movant by reason of the fact that the names of the persons who are in said boxes were selected by a Commission from which members of the Negro race had been purposely, systematically and arbitrarily excluded on account of their race and color.

11.

Movant shows that the said list of Grand Jurors and list of Petit Jurors, as the same are presently constituted, are illegal and void, and that the same should be quashed, set aside and cancelled, and that the aforesaid indictment returned by the aforesaid Grand Jury, which is tainted with the aforesaid illegality, should be quashed, set aside and voided by this court.

12.

Movant shows that for the past thirty years no member of the Negro race has been drawn to serve, nor has served, as a member of a Grand Jury in said County.

13.

Movant shows that there are numerous citizens who are members of the Negro race who are competent and qualified for Grand Jury service as to age, experience, intelligence and uprightness, and who are legally qualified to act as Grand Jurors, but that the names of these persons have been purposely, systematically and expressly excluded from the list of names of persons who are drawn for Grand Jury duty. Movant shows that the aforesaid Jury Commission in selecting the names of persons to be placed in the Grand Jury box in said County have purposely, systematically and expressly limited the said number to only six members of the Negro race, and that three of the said six whose names appear in the Grand Jury box are beyond the age of 80 years, and are ineligible to serve.

32

14

Movant shows that there be no legal Grand Jury drawn, selected and impaneled or organized in said County to consider an indictment against a member of the Negro race for the reason that the names of Negro persons have been arbitrarily, systematically and purposely excluded from the Grand Jury list of said County because of their race and color.

15

Movant shows that there can be no legal Grand Jury drawn, selected, impaneled or organized in said County to consider an indictment against a member of the Negro race for the reason that the Jury Commission of said County is made up of six White male persons, and that the members of the Negro race have been arbitrarily, systematically and purposely excluded from said Jury Commission on account of their race and color.

16

Movant shows that an array of Petit Jurors has been put upon him for trial of the aforesaid case, and that the jury, venire and panels are composed solely of male citizens who are members of the White race and from which members of the Negro race have been expressly and systematically excluded because of their race and color.

17

Movant shows that the Petit Jury list of said County is made up of persons who reside in said County and whose names appear in the Traverse Jury box thereof, and that the names of the persons whose names are in the Traverse Jury box thereof are selected from the books of the Tax Receiver of said County and are placed in said Traverse Jury box by the Jury Commission of said County. Movant shows that for many years the names of members of the Negro
33 race have been excluded from jury duty in said County as a result of a scheme and devise purposely and systematically practiced by the officials of said County who limit the number of names of qualified negroes whose names appear on the Traverse Jury list to six; and that three of said number are not qualified to serve by reason of Section 59-112 of the Code of Georgia of 1933.

18

Movant shows that there are numerous citizens of said County who are members of the Negro race who are competent and qualified as to age, experience, intelligence and uprightness, and who are legally qualified to act as Petit Jurors, but that the names of these

persons have been purposely, systematically and expressly excluded from jury service solely on account of their being members of the Negro race.

19

Movant shows that the systematic and purposeful exclusion of Negroes from the Board of Jury Commissioners of Cobb County, from Grand Jury service in said County, and from Petit Jury service in said County, is a violation of the rights of movant under Article 1, Section 1, paragraph 3 of the Constitution of Georgia, which is the "due process clause", and a violation of his rights under the 14th Amendment to the Constitution of the United States of America and of 8 U.S.C.A. paragraph 44.

Wherefore, the movant prays:

(a) That this court quash the appointment of the Jury Commission of said County;

(b) That this court set aside, cancel and annul the entire jury list of said County as made up and compiled by the aforesaid Jury Commission;

34 (c) That this court rule and decree that the Grand Jury which returned the aforesaid indictment was illegally selected;

(d) That the court quash the said panel of Grand Jurors for the said term of the said court which returned the aforesaid indictment, and that it quash, cancel and set aside the aforesaid indictment;

(e) That this court quash, annul and set aside the entire Petit Jury, Venire and Panel now put upon the movant;

(f) That this court, in order to insure a trial of the movant in accordance with the constitution and laws of Georgia and the Constitution and laws of the United States of America, grant any further and additional relief in the premises as to the court may seem meet and proper.

Duly sworn to by Amos Reece. Jurat omitted in printing.

DANIEL DUKE,
Attorney for Defendant.

[File endorsement omitted]

35 In the Superior Court of Cobb County

[Title omitted]

DEMURRER TO DEFENDANT'S SPECIAL PLEA IN ABATEMENT—
Filed June 22, 1954

Comes now Luther C. Hames, Jr., Solicitor General, Cobb Judicial Circuit, and files this his demurrer to the plea in abatement and mo-

tion this day filed by the defendant, and for grounds and reasons says:

1

The State demurs to said motion to quash upon the ground and for the reason that none of the parts or paragraphs, and neither in its entirety does the said motion set forth sufficient cause or grounds to abate said indictment.

2

The State demurs to said motion to quash for the reason that a true bill has been found by the grand jury regularly and legally organized and the defendant had notice of the questions now attempted to be raised prior to the finding of the true bill, as shown upon the face of said motion, and for this reason said motion is too late and improperly raised at this time and said motion should be stricken.

3

The State demurs to said motion to quash upon the ground and for the reason that the challenge to the grand jurors as contained in said motion are the same grounds and upon the same reasons embraced in a challenge to the array filed at the October, 1953 term, Cobb Superior Court, upon which said challenge filed at the October, 1953 term the Court then and there denied the same, and that the said ruling was embraced in a motion for a new trial in the case of Amos Reece vs. The State, No. 18,553 in the Supreme Court of Georgia, and in the said Supreme Court the judgment of
36 the trial court (Cobb Superior Court) in that particular was affirmed, and for such reason the same constitutes the law of the case and res adjudicata.

4

The State demurs to said motion upon the ground and for the reason that the issues now sought to be raised by the motion to quash should have been incorporated in and made a part of the motion to quash filed by the defendant at the October, 1953 term, upon which motion the trial court entered an order denying the challenge to the grand jurors, this judgment thereafter being affirmed by the Supreme Court of Georgia in case No. 18,553, May 11, 1954, and all issues as to the appointment of jury commissioners, their qualification and performance of duties, the selection and empanelling of both grand and petit jurors should have been raised in said motion, and the same not having been raised, are waived, and therefore the action at the October, 1953 term of court and the affirmance by the Supreme Court of such action constitutes the law of the case and res adjudicata.

5

The State further demurs to said motion to quash upon the ground and for the reason that it is a challenge propter affectum, which must be taken advantage of upon the call of the case, and the defendant having previously filed at the October, 1953 term, Cobb Superior Court a motion to quash upon a basis of propter affectum and the trial court to said previous motion to quash having passed an order overruling the same, the action of the trial court having been affirmed in the case of Amos Reece vs. The State, No. 18,553, May 11, 1954, the same constitutes the law of the case and res adjudicata.

37

6.

The State further demurs to said motion to quash upon the ground and for the reason that it is a challenge propter defectum, which must be taken advantage of upon the call of the case, and the defendant having previously filed at the October, 1953 term, Cobb Superior Court, a motion to quash upon a basis of propter defectum, and the trial court to said previous motion to quash having passed an order overruling the same, the action of the trial court having been affirmed in the case of Amos Reece vs. The State, No. 18,553, May 11, 1954, the same constitutes the law of the case and res adjudicata.

7.

The State further demurs to the motion to quash as a whole upon the ground that the basis for the same as laid are erroneous conclusions as to constitutional rights guaranteed to defendant, in that defendant claims guarantees under the due process and equal protection clause of the Constitution of both the State of Georgia and the United States, which are erroneous conclusions, and said motion for this reason should be dismissed.

8.

The State demurs specially to the allegations contained in paragraphs 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the motion to quash, upon the ground and for the reason that the facts set forth in said paragraph are the same facts and the same issues as contained in a motion to quash filed by said defendant in the same case at the October, 1953 term, Cobb Superior Court, the trial court having at said term of court overruled the motion to quash and thereafter the Supreme Court of Georgia, on the 11th day of May, 1954, having affirmed the judgment and decree of the trial court overruling said motion to quash, and for such

38 ground and reason the allegations contained in said paragraphs constitute the law of the case and res adjudicata.

Wherefore the State prays that these its grounds of demurrer be inquired into, that they be sustained, and said motion to quash dismiss.

LUTHER C. HAMES, JR.,
Solicitor General,
Cobb Judicial Circuit.

In the Superior Court of Cobb County.

JUDGMENT—June 22, 1954

The within demurrer to defendant Amos Reese's motion to quash this day filed, coming on for hearing, after hearing all pleadings read and argument of both counsel same is hereby sustained and motion to quash, denied. This June 22, 1954.

JAS. T. MANNING,
Judge, S. C. Cobb Jud. Circuit.

[File endorsement omitted.]

39 In the Supreme Court of Georgia

Case No. 18780

AMOS REECE

v.

THE STATE

Decided January 10, 1955

Rehearing denied February 17, 1955

SYLLABUS OPINION BY THE COURT

DUCKWORTH, *Chief Justice.*

(1) 1. In the first appearance of this case, Reece v. State, 210 Ga. 378, 82 S.E. 2d 10, this court ruled that the accused failed to raise objections to the competency of the grand jurors before the indictment was found against him and, therefore, the lower court did not err in denying his motion to quash the indictment for this reason; hence the attempt to again challenge the array of grand jurors and to quash the indictment upon the same ground must fail, as this question has already been adjudicated adversely to the defendant, and the court did not err in sustaining the demurrer thereto.

(2) 2. The other allegations of the plea or motion to quash the indictment which, in substance, alleges that there are only 6 persons of the Negro race whose names appear in both grand-jury and traverse-jury boxes of Cobb County, that three of these are 80 years of age or older, that none of the members of the Board of Jury Commissioners has ever been a member of the Negro race or that no member of the Negro race has ever been drawn to serve on the grand jury in the past 30 years, fails to show a "systematic and purposeful exclusion of Negroes" from the Board of Jury Commissioners, or from jury service in said county, and these allegations fail to show any violation of the rights of the movant under either the State or Federal Constitutions. Hence the court did not err in sustaining the demurrer to the plea or motion and denying the same. See Code Ann. 2-5102, Const. art. 6, 16, par. 2; Code Ch. 59-1 and particularly Code, 59-803 thereof; Wheeler v. State, 42 Ga. 306, 307, 308; Thomas v. State, 67 Ga. 460(1); Wilson v. State, 69 Ga. 224; McLain v. State, 71 Ga. 279; Davis v. Arthur, 139 Ga. 74, 76 S.E. 676; Carter v. State, 143 Ga. 632(2), 85 S.E. 884; Harris v. State, 191 Ga. 243(8), 12 S.E. 2d 64; Rawlins v. State, 124 Ga. 31, 52 S.E. 1; Rawlins v. State of Georgia, 201 U.S. 638, 26 S. Ct. 560, 50 L. Ed. 899, affirming Rawlins v. State, 124 Ga. 31, 52 S.E. supra; Watkins v. State, 199 Ga. 81(6), 33 S.E. 2d 325; Crumb v. State, 205 Ga. 547, 54 S.E. 2d 639.

(3) 3. Whether or not the reading of an excerpt from a former decision of this court in Dorsey v. State, 108 Ga. 477 (2), 34 S.E. 135, to the court in the opening argument as to the difference in race and social standing of the accused and the prosecutrix as facts to be considered in determining if a crime was committed, was error and harmful to the accused, the court promptly instructed the jury to disregard the decision and to "disabuse your minds of the question of race, or position and social standing" of the citizens involved. This instruction was sufficient to remove any improper impression from the minds of the members of the jury. See Code, 81-1009; Joyner v. State, 208 Ga. 435, 67 S.E. 2d 221; Nelson v. State, 187 Ga. 576 (6), 1 S.E. 2d 641; Holley v. State, 191 Ga. 804, 807 (8), 14 S.E. 2d 103; Smith v. State, 201 Ga. 184, 188 (2), 48 S.E. 2d 860; Bond v. State, 68 Ga. App. 15 (2), 21 S.E. 2d 866.

(4) 4. The evidence was sufficient to support the verdict and the general grounds of the motion are without merit. The court did not err in denying the motion for new trial, as amended.

Judgment affirmed.

All the Justices concur.

42 Supreme Court of the United States, October Term, 1954

No. 588 Misc.

AMOS REECE, PETITIONER,

vs.

STATE OF GEORGIA

On petition for writ of Certiorari to the Supreme Court of the State of Georgia.

ORDER ALLOWING CERTIORARI—May 31, 1955

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted and the case is transferred to the appellate docket as No. 832 and assigned for argument immediately following No. 628.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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REME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE, *Petitioner*

vs.

STATE OF GEORGIA

RIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRIEF FOR PETITIONER

DANIEL DUKE,
301-2 Volunteer Building,
Atlanta, Georgia.

INDEX

Subject Index.

	Page
Brief for petitioner	1
Reference to the official opinions in the Court below	1
Statement of the grounds on which jurisdiction is involved	1
The questions presented	4
Statement of the case	8
Argument and citation of authorities	11

Table of Cases Cited.

Carter v. *Texas*, 177 U.S. 445	12
Cassell v. *Texas*, 339 U.S. 291	12
Hernandez v. *Texas*, 347 U.S. 475	16
Malinski v. *New York*, 324 U.S. 416	14, 15
Martin v. *Texas*, 200 U.S. 316	12
Norris v. *Alabama*, 294 U.S. 587	12
Palko v. *Connecticut*, 302 U.S. 319	14
Patton v. *Mississippi*, 332 U.S. 463	12
Powell v. *Alabama*, 278 U.S. 69	15
Reece v. *Georgia*, 210 Georgia 578, 82 S.E. (2nd) 10, 211 Georgia 339, 85 S.E. (2nd) 773	1, 5, 7, 11
Rogers v. *Alabama*, 192 U.S. 226	12
United States v. *Gale*, 109 U.S. 65	12, 15
Williams v. *Kaiser*, 323 U.S. 475	14

Statutes and Authorities Cited.

Constitution of the United States, 14th Amendment,	2, 3, 4, 10, 11
Rules of the Supreme Court of the United States, Rule 19(1-a)	4
Rules of the Supreme Court of the United States, Rule 22	2
Rules of the Supreme Court of the United States, Rule 53	2
United States Code, Title 28, Section 1257	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE, *Petitioner*

vs.

STATE OF GEORGIA, *Respondent*

BRIEF OF THE PETITIONER ON THE MERITS.

I.

(a)

Reference to the Official Opinions in the Court Below.

The opinions of the Supreme Court of the State of Georgia under review here are reported in:

(a) 211 Georgia Reports, page 339; 85 S.E. 2nd, page 773, rendered January 10, 1955; rehearing denied February 17, 1955.

(b) 210 Georgia Reports, page 578; 82 S.E. 2nd, page 10, rendered May 11, 1954, which said opinion reversed the trial court and remanded the case for a retrial.

(b)

Statement of the Grounds on Which Jurisdiction Is Invoked.

On June 24, 1954, the petitioner, an illiterate Negro male, of low mentality, was placed on trial in the Superior Court of Cobb County, Georgia, upon an indictment which accused him of the rape of a white female. Before plead-

ing to the merits, a written motion to *quash* the *venire* and *panels of petit* (trial) *jurors* was filed alleging that competent and legally qualified members of the Negro race had been excluded, solely because of their race and color, from the venire and panels of the petit (trial) jurors from which the petitioner would have to select the jury which would try him, and that such discrimination in the composition of the venire and panels of petit jurors violated the rights of the petitioner as secured to him under the 14th Amendment of the United States Constitution. The State filed a written motion to dismiss the plea of the petitioner, and the court below sustained the State's motion and dismissed the plea. This ruling of the trial court was duly appealed to the Supreme Court of Georgia, the highest appellate tribunal of the State of Georgia.

The trial court's dismissal of the petitioner's plea was sustained by the Supreme Court of Georgia, on January 10, 1955; a motion for a rehearing was filed by the petitioner within ten days, and on February 17, 1955, the motion for a rehearing was denied by the Supreme Court of Georgia. Within ninety days after the entry of the judgment of the Supreme Court of Georgia, the petition for certiorari to review the judgment of the Supreme Court of Georgia; together with a motion with petitioner's affidavit attached, to proceed in forma pauperis, was filed in this Court in compliance with Rule 22 and Rule 53.

As a part of the entire proceedings against the petitioner, a ruling and judgment of the Supreme Court of Georgia, rendered on May 14, 1954, when a prior conviction of the petitioner, on the same indictment, was reversed and the case was remanded to the court below for a retrial, must be considered because the Supreme Court of Georgia, in its decision of January 10, 1955, assumed contrary to the facts, contrary to its own opinion of May 14, 1954 and contrary to the record that there had been a prior

adjudication on the issue of the legality of the petit (trial) jury as raised by the petitioner's special plea in abatement timely filed at his second trial on June 24, 1955.

The jurisdiction of this Court is also invoked to review those portions of the opinion of the Supreme Court of Georgia, in its decision of May 14, 1954, when it reversed the petitioner's prior conviction and remanded the case to the court below for a retrial, even though the rulings made therein on the constitutional questions were adverse to this petitioner, and were not appealed at that time to this Court. It is contended that the ruling of the Supreme Court of Georgia on May 14, 1954, denied this petitioner "due process of law" as guaranteed him under the 14th Amendment of the Constitution of the United States, in that said opinion in headnote one thereof refused to consider the merits of a motion to quash the indictment against him because of racial discrimination in the selection of the Grand Jury which indicted the petitioner, on the grounds that the motion to quash was filed too late when filed after the indictment. It is now urged that said ruling deprived this petitioner of his constitutionally guaranteed right to the effective aid benefit of counsel as embraced within "due process", and that since the face of the record disclosed this deprivation of "due process", that this Court in order to facilitate justice and adjudicate all matters that might hereafter arise, now has jurisdiction to and should review and correct the errors here complained of contained in the opinion of the Supreme Court of Georgia, as rendered in this case on May 14, 1954.

The statutory provisions upon which the jurisdiction of this Court is invoked are as follows:

Fourteenth Amendment: Section I:

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 28, U.S.C.A., Section 1257: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . . . . .

"(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . or statutes of the United States."

Rule 19, paragraph 1(a): "(a) Where a state court has decided a federal question of substance . . . in a way probably not in accord with applicable decisions of this court."

(c).

The Questions Presented.

(1) Did the petitioner in his special plea filed on June 22, 1954, prior to pleading to the merits on the indictment against him, sufficiently allege and claim the deprivation of his rights under the Fourteenth Amendment of the Constitution of the United States, and should the trial court have permitted the petitioner to have introduced evidence to show that legally qualified and competent members of the Negro race had been systematically and purposely excluded, because of their race and color, from the panels and venire of petit (trial) jurors which were about to be put upon him at his said second trial?

(2). Did the ruling of the Supreme Court of Georgia appearing in #210 Georgia Reports at page 578, headnote 1 thereof, which held that one who was accused of a capital felony and was committed to jail was under a duty to

raise by a proper pleading prior to the indictment the deprivation of his constitutional right to have a grand jury pass upon the charge against him from which members of the Negro race had not been excluded because of their race and color, constitute res judicata on the question of whether or not members of the Negro race had been excluded because of their race and color from the petit jury venire and panels that were being put upon him at his trial?

(3) Does the fact that the petitioner raised questions as to the legality of the jury commission which selected the names of persons whose names were in both the grand jury and petit jury boxes of the County and raised the question of the legality of the grand jury which indicted him in one and the same pleading in which he makes constitutional objections to the composition of the venire and panels of the trial jurors, make his plea subject to dismissal without proof, merely because a great part of the plea may be superfluous?

(4) Were there sufficient allegations in the petition to require proof of the alleged deprivation of a fundamental right arising under the Constitution of the United States?

(5) Could the ruling of the Supreme Court of Georgia in the case of *Reece* vs. *The State*, 210 Georgia, page 578, headnote 1 thereof, operate to prevent the petitioner on a second trial on the same indictment from raising objections, prior to going to trial on the merits of the indictment, to the venire and panels of petit jurors put upon him at his second trial and forever preempt him from abating the trial, regardless of whether or not qualified and competent members of his race had been purposely and systematically excluded from the venire and panels of jurors because of their race and color?

(6) Does the fact that the petitioner at his first trial presented only an objection to the composition of the

grand jury which indicted him, and went to trial on the indictment without making any constitutional objection to the petit jury put upon him, operate as a waiver ad infinitum upon any subsequent retrial upon the same indictment when a different and new venire and panels of trial jurors are put upon him from moving by a timely motion to set aside and quash the venire and panels of petit jurors from which competent members of his race had been purposely excluded because of their race and color?

Subsidiary Questions Comprised Within the Larger Questions and Which It Is Respectfully Submitted Should Be Passed Upon By This Court.

(7) Did the judgment of the Supreme Court of Georgia in the decision of May 11, 1954, in Case No. 18553, 210 Georgia 578, that the petitioner, under the circumstances, filed his motion to quash the indictment too late and that his objections to the grand jurors that returned the indictment should have been presented prior to his indictment, deprive this petitioner of his right to show that there had been systematic and purposeful discrimination against qualified members of his race in the selection of the grand jury, and did the judgment of the Supreme Court of Georgia, in this respect, deprive the petitioner of the right to the effective aid and assistance of counsel in violation of the due process clause of the Fourteenth Amendment?

(8) Is the fundamental constitutional question of race discrimination in the selection of grand jurors, which was raised at his first trial, now closed by virtue of the ruling in the case of *Reece* vs. *The State*, No. 18553, 210 Georgia 578, 82 S.E. 2nd 10, because the petitioner did not appeal the adverse judgment on the federal question to this Court within the ninety day rule? Was the ruling in *Reece* vs.

The State of Georgia, 210 Georgia Reports, page 578, headnote 1 thereof, such a final order and ruling that the same should have been appealed to this Court within ninety days from the rendition thereof?

In a case where a federal question was raised in the trial court and urged on appeal, which is reversed on a question purely a matter of state law and remanded to the trial court for a retrial, does the judgment of the highest State Court on the federal question continue to be such a part of the "whole course of proceedings" against the petitioner, that jurisdiction is retained in this court to review on certiorari the adverse judgment of the State Court on the federal question?

Since the adverse ruling on the federal question raised at the petitioner's first trial constitutes the basis of the State's demurrer to the petitioner's motion raising federal questions at his second trial, does the record and judgment thereby become a part of Case No. 18780, 211 Georgia 339, 85 S.E. 2nd 773, so that this Court must pass upon the fundamental constitutional questions raised at his first trial in order to reach a determination on the constitutional questions raised at his second trial?

(9) Does the evidence presented on the question of discrimination in the composition of the grand jury which was offered and accepted by the Court at the petitioner's first trial in October, 1953, disclose that discrimination had been practiced in selecting the names of persons who composed the grand jury lists of the County, and did the trial court commit error in refusing to quash the said indictment?

(10) If qualified competent Negroes had been for more than thirty years excluded from membership on the jury commission which made up the grand jury and petit jury lists of a county, and that pattern of exclusion had carried

forth into the composition of the jury lists, from which persons were selected to serve on the grand juries and trial juries, may a Negro, accused of a capital felony, raise, by a proper and timely motion such discrimination, and should he be permitted to introduce such evidence as he may have to prove that the selection of the jury commission was tainted with discrimination against members of his race, and that such exclusion from the jury commission was one link in the chain of excluding members of his race from participating in grand jury and petit jury service of the county where he was accused and tried?

(d)

Statement of the Case.

This case arose in the Superior Court of Cobb County, Georgia on an indictment numbered 1961, returned by the Grand Jury on October 23, 1953, which charged the petitioner, a Negro male person, with the offense of rape upon a white female person on October 20, 1953. Petitioner was arrested and incarcerated on October 20, 1953 for said offense. On October 24, 1953, the Court appointed two local attorneys to represent the petitioner at his said trial.

Prior to the petitioner pleading to the merits on the aforesaid indictment, on October 30, 1953 he filed a motion, (R-1-3). The Court entertained said motion, and after hearing evidence submitted showing that members of the Negro race had been systematically and purposely excluded because of their race and color from the grand jury that had indicted the petitioner, the Court overruled the motion, and the petitioner was tried on October 30, 1953 on the merits of said indictment, was found guilty by the jury and sentenced by the Court to be electrocuted.

The verdict and judgment of the Supreme Court of

Georgia, the highest appeals tribunal in the State, and being therein numbered 18553, is officially reported in =210 Georgia Reports, page 578, 82 S.E. 2nd, page 10, (R-16-17).

The verdict and judgment of the trial court was reversed, and the petitioner was remanded to be retried upon the same indictment, the said reversal being decided on May 11, 1954, (R-16).

The ruling and judgment of the trial court on the petitioner's motion to quash the aforesaid indictment was included in the appeal and was determined adverse to the petitioner in Headnote =1 of the decision appearing in =210 Georgia Reports, page 573, (R-16). The Supreme Court of Georgia did not consider the evidence submitted by the petitioner upon said motion, but ruled that the motion to quash the indictment brought by the petitioner should have been brought prior to his indictment and that his motion to quash the indictment came too late where the same was brought after the indictment, (R-16).

This ruling of the Supreme Court of Georgia was not appealed to the United States Supreme Court, and it is contended that this ruling constituted part of the whole proceedings against this petitioner and that this Court now has jurisdiction to pass upon the sufficiency of the evidence submitted as to the exclusion of members of the Negro race from the grand jury lists of said County and from the grand jury which indicted the petitioner and to review and to reverse Headnote 1 of the case of *Reece* vs. *The State* in =210 Georgia Reports at Page 573, for the reason that said ruling denied this petitioner the right and benefit of counsel as the same is embraced in the Fourteenth Amendment of the United States Constitution.

The petitioner was retried on June 22, 1954 on the afore-

said indictment in said County. Prior to pleading to the merits at his second trial which was had on June 22, 1954, the petitioner who had a different attorney at his second trial, filed a special plea in abatement, wherein he sought to quash the venire and panels of petit jurors being put upon him at his said second trial for the reason that there were no members of the petitioner's race on the venire and panels of jurors being put upon him and because members of the Negro race had been systematically and purposely excluded from the lists of petit (trial) jurors in said County, (R-18-23).

In response to the petitioner's written plea in abatement, the State filed a demurrer, (R-23). The said demurrer incorporated both a general demurrer, a plea of res judicata and a plea that the petitioner had waiver his right to challenge by a proper motion the exclusion of members of his race from the trial jury lists of the County, (R-23-26).

The Court, after hearing arguments from both the State and the petitioner, sustained the demurrer and denied the motion; (R-26).

The petitioner was retried upon the merits of the aforesaid indictment on June 22, 1954 in Cobb County and was found guilty by the jury and was sentenced by the Court to be electrocuted. The petitioner appealed the said verdict and sentence to the Supreme Court of Georgia, the highest appeals tribunal in the State of Georgia, the said appeal being numbered in said Court 18780, and appearing in 211 Georgia Reports at page 339, 85 S.E. 2nd, page 773, and the same was decided on January 10, 1955, rehearing being denied on February 17, 1955, (R-26-27).

The case is before this Court in order to correct the alleged errors affecting rights of this petitioner arising under the Fourteenth Amendment of the Constitution of

the United States as said errors are embraced in Headnotes 1 and 2 of the decision of the Supreme Court of Georgia in 211 Georgia Reports, page 339, 85 S. E. 2nd, page 773 (R-26-27).

(c)

Argument and Citation of Authorities.

The petitioner herein does not contend that he has a right arising under the Fourteenth Amendment of the United States Constitution to have members of the Negro race proportionately represented on the grand jury lists of the County in which he was tried or on the trial jury lists of the County in which he was tried.

The petitioner does contend that the Fourteenth Amendment gives him the right to have members of the Negro race on the particular trial jury which tried him. He does not contend that he has a right arising under the Constitution to have a Negro included in the venire and panels of trial jurors put upon him for trial.

The petitioner does contend that the Fourteenth Amendment of the Constitution of the United States protects him against discrimination against qualified Negro citizens in denying them the right and privilege of participating in the administration of the law, as jurors (either as grand jurors or petit jurors), because of their race and color. Petitioner contends that where prior to going to trial on an indictment charging him with a capital felony for the commission of an offense upon a white female, he, in writing, alleged that no member of his race was on the venire and panels of petit jurors about to be put upon him and that members of his race had been excluded from the venire and panels of petit jurors by the officials of the County arbitrarily and discriminatorily because of their race and color, that he was entitled to prove his said allegations and that it was a denial of his rights under the Fourteenth

Amendment of the United States Constitution for the trial court to dismiss his said plea without hearing evidence.

Carter v. *Texas*, 177 U.S. 445, at page 450
Rogers v. *Alabama*, 192 U.S. 226.
Martin v. *Texas*, 200 U.S. 316.
Norris v. *Alabama*, 294 U. S. 587.
Patton v. *Mississippi*, 332 U.S. 463.
Cassell v. *Texas*, 339 U.S. 291.

Where one files a plea setting forth that a fundamental requisite arising under the Constitation of the United States is lacking in the mode and method by which he is being brought to trial, it is for the United States Court to determine whether the pleadings are sufficient to withstand a general demurrer, or whether the party has waived his right to attack the method and manner of procedure, or whether the matter has been previously adjudicated.

U. S. v. *Gale*, 109 U.S. 65.
Hale v. *Commonwealth of Kentucky*, 303 U. S. 613.

The petitioner by his plea challenging the array of petit jurors which were put upon him set out specifically that members of the Negro race who were otherwise qualified and competent to be jurors had been purposely discriminated against by those who compiled the lists of jurors in the County where he was tried and tried for a capital felony. The venire and panels of petit jurors which were put upon the petitioner at his second trial on June 22, 1954 was a new, separate and distinct venire of jurors. Never before at any previous trial had on the same indictment was the petitioner confronted with those panels of jurors. According to Georgia procedure, the jurors put upon him at his second trial had been drawn from the jury box ten days prior to June 22, 1954, and had been summoned to appear for jury duty for the week of June 22,

1954. It is respectfully urged that the petitioner could not have ever at any time waived his right to assert his rights under the Fourteenth Amendment to question the validity of these panels of petit jurors. It is respectfully urged that the adjudication of his rights at his trial in October, 1953 on the same indictment could not be res judicata upon the questions raised as to the legality of the petit jury which was being put upon him when the indictment was called for trial on June 22, 1954.

In adjudicating the petitioner's rights to have an indictment returned against him, by a grand jury composed of persons from which legally qualified and competent members of the Negro race had not been excluded because of their race and color, which he had raised by plea at his trial upon the same indictment in October, 1953, the Supreme Court of Georgia did not consider the evidence which was submitted upon that question. The Supreme Court in adjudicating upon that question in its opinion of May 11, 1954 (R-16-17) held that he brought the motion to quash the indictment too late. They therefore did not examine the record of the evidence that was before them that was submitted as to the discrimination. The said evidence, in order to exemplify the fact that the Court did not consider it and because it is contended that this Court should now pass upon the evidence submitted upon the motion to quash, is set out in the record (R- 4-14). The petitioner was arrested in the late afternoon of October 20, 1953. An indictment was returned by the Grand Jury on October 23, 1953. Local attorneys were appointed to represent the petitioner on the afternoon of October 24, 1953. The Supreme Court of Georgia in the aforesaid opinion has ruled that in order to test the legality of the grand jury which returned the indictment, this petitioner

should have objected prior to the indictment, at a time when he did not have counsel and at a time when he was incarcerated in the jail in Cobb County, Georgia. The facts here need no elaboration. The opinion of the Court that the petitioner's motion to quash was filed too late is a clear denial of due process of law to this petitioner and is also a denial of petitioner's right to the aid, assistance and benefit of counsel as is embraced within the due process clause of the Fourteenth Amendment of the United States Constitution.

Palko v. *Connecticut*, 302 U.S. 319, at page 324 and 325.
Williams v. *Kaiser*, 323 U.S. 475.
Malinski v. *New York*, 324 U.S. 416.

Where an illiterate Negro of low mentality is incarcerated in the jail and where an all-white grand jury indicts him at a time when he does not have legal council, it is urged that he is denied one of the essential elements of procedural due process if a court after indictment denies him the right to assert and prove that a fundamental requisite under the United States Constitution was lacking in the method and procedure by which he was indicted. The aid and assistance of counsel implicit in the due process clause must of necessity mean advice, aid and assistance of counsel at every step of the proceeding which finally and ultimately condemns the person. The selection of a jury list from which names are drawn for the selection of a grand jury is just as much an essential element of a criminal prosecution for a capital felony in Georgia as the trial itself. Therefore, to rule that this illiterate Negro of low mentality who was incarcerated in jail and who did not have an attorney must have raised prior to his indictment the question of discrimination against members of his race is contrary to the Fourteenth Amendment of the

Constitution of the United States and in conflict with many decisions of this Court.

U. S. v. *Gale*, 105 U. S. 65 and 66;
Powell v. *Alabama*, 278 U. S. 69;
Maliński v. *New York*, 324 U. S. 416 and 417.

There was raised in the plea challenging the array of petit jurors put upon the petitioner at his second trial had on June 22, 1954, the question of the pattern of discrimination practiced in the composition of the jury lists of the County as a whole.

It was alleged that there were at least one hundred members of the Negro race legally qualified and competent to serve as jury commissioners in the County, but that none had ever been appointed to serve and that members of the Negro race had been excluded from membership on the commission because of their race and color and that this discrimination against members of his race tainted the whole lists of grand jurors and petit jurors in the County.

This is a question that must ultimately be answered. Those in this region familiar with the modes of thought and action that exist in actuality beneath the abstract law—law and procedure in action—know that Negroes will never participate in the administration of justice on an equality with white persons, until their race is represented on the commissions and boards that select the persons to perform jury duty. The grovelling abasement of our legal system in the rural counties of the South to the worst element of the race demagogue will never end until the Negro takes his place on the boards of jury commissioners who select the names of persons who are subject to jury duty. The question is open in this case—it is open on a ruling on a demurrer. It is therefore presented as an abstract legal question. Does the Fourteenth Amendment (due process and equal protection clauses) extend far enough to embrace

the composition of the board or commission which selects the names of the persons who appear in the jury boxes of a particular jurisdiction?

May a Negro person charged with a capital felony, assert his right under the United States Constitution by a timely motion to test the legality of the grand jury and petit jury because they are composed of persons selected by a board or commission from which legally qualified and competent members of his race have been systematically and arbitrarily excluded because of their race and color?

May he assert this discrimination as a part of a whole pattern of discrimination—as in this case it was sought to do? It was no accident that only six Negro names appeared out of 2,750 names in the Grand Jury and Petit Jury Boxes. It was no accident that three of the Negroes were beyond eighty years of age—two of them deaf and sick. It was no accident that the other three were beyond sixty years of age and one of them did not live in the County and was therefore not legally qualified.

Those facts emphasize the necessity of having a jury commission from which Negroes have not been excluded solely because of their race and color.

This Court has recognized this problem in a case coming up from the State of Texas, where the jury commission system is used in selecting grand and petit jurors. The systems in Texas and Georgia are similar.

Hernandez v. Tex., 347 U. S. 475, 96 L. Ed. 868.

This petitioner respectfully contends that he had a right under the Fourteenth Amendment of the Constitution, the "equal protection clause", to be tried by a jury from which members of his race had not been systematically excluded because of their race. He was prevented from proving by evidence such exclusion from the jury which tried him, by

a ruling of the trial court, which dismissed a timely challenge to the array of petit jurors. It is urged that the court erred and that the conviction should be reversed and remanded with proper instructions.

It is also contended that this petitioner was denied the right and benefit of counsel as the same is embraced in the "due process clause", at his first trial on the same indictment, when the Supreme Court ruled that a motion to quash the indictment was too late if filed after the indictment—and that the fact that the petitioner was in jail and without a lawyer did not relieve him of claiming his Constitutional right to be indicted by a grand jury from which members of his race were not excluded because of their race before the said grand jury returned the indictment.

It is further contended that the evidence which was submitted on the motion to quash the indictment on October 24, 1953, as incomplete as it is, was sufficient to show deliberate and systematic exclusion and discrimination against members of the Negro race.

Respectfully submitted,

DANIEL DUKE,
Counsel for Petitioner.

September 19, 1955. 301-2 Volunteer Building, Atlanta 3, Georgia.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 112

AMOS REECE,

Petitioner,

vs.

STATE OF GEORGIA.

PETITIONER'S REPLY BRIEF

DANIEL DUKE,
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Atlanta, Georgia.

INDEX.

PETITIONER'S REPLY BRIEF

	Page
I. 1(a) Misstatement of Record at page 3 of Respondent's Brief	2
1(b) Misstatement of Record at page 4 of Respondent's Brief	2
1(c) Misstatement of Record at page 5 of Respondent's Brief	3
1(d) Misstatement of Record in footnote 8 of page 11 of Respondent's Brief	6
1(e) Denial of an Implication Appearing on page 24 of Respondent's Brief	9
II. Rebuttal of Respondent's Contention that Georgia Procedure Requires that a Motion to Quash an Indictment Must Be Brought Prior to the Return of the Indictment.	11
Williams v. *State*, 69 Georgia 11(5-c)	13
Lee v. *State*, 69 Georgia 205	13
Parris v. *State*, 125 Georgia 777(3)	13
Reece v. *State*, 205 Georgia 578(1)	14
Hawkins v. *State*, 86 Georgia Appeals 872	16
Avery v. *State*, 209 Georgia 116—117	16
Crumb v. *State*, 205 Georgia 574	17

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PETITIONER'S REPLY BRIEF

This is a reply brief filed by the petitioner in response to certain allegations of fact, the same being denied herein, contained in the brief filed by the respondent State of Georgia, and in response to and denial of certain claims made by the respondent pertaining to the existence of certain procedural rules governing the raising of fundamental constitutional rights in criminal cases. This reply brief is divided into two parts designated as follows:

I

It is alleged and asserted herein by the petitioner, that certain affirmative misstatements of fact and incorrect and untrue assumptions of fact are contained in the brief filed on behalf of the State of Georgia. They are dealt with herein in the order of their appearance according to page numbers on which they appear.

1(a)

This Court's attention is directed to page 3 of the brief filed by the respondent State of Georgia, the specific part being:

> "At both the first and second trials, the State's testimony consisted of positive identification of the petitioner by the victim, *a confession* by the petitioner. . . ."

A casual reading of the transcript of the testimony will show that if the strongest construction is placed upon the statements allegedly made by the petitioner, they could only be *incriminatory statements* and could not constitute "a confession." The word confession has a certain specific legal content, and it is elemental that a statement made by one charged with a crime in order to be a confession must not contain any exculpatory contentions, and the statement must embrace a free and voluntary admission of each element of the crime. What the State calls "confession" does not measure up to the legal requirement. The crime of rape must be "without the consent of the female"—this petitioner has at no time admitted sex relations with the prosecutrix without her consent. In his statements he said *she did not resist.*

1(b)

The State of Georgia, on page 4 of its brief, uses the following language:

> "In addition, at the first trial petitioner asserted the defense of insanity, and his own medical witness related the details of a *confession* made to him by petitioner."

The medical witness referred to is Dr. J. M. Anderson, and the testimony of Dr. Anderson at the petitioner's first trial, among other things, was:

> "I asked him (the petitioner) if she (the prosecutrix) offered any resistance to him and he said she did not."

It is respectfully submitted that, while the matters contained on pages 3 and 4 of the brief are not germane to any of the issues raised, and go far beyond the range of applicable argument on the legal and constitutional questions presented for determination, the bland characterization of statements made by this petitioner as "confessions" should not be permitted to remain on the record unchallenged, undisputed and undenied.

1(c)

This Court's attention is directed to page 5 of the brief of the respondent State of Georgia, the specific portion being set out as follows:

> "Both the allegations of the *two* motions to quash (R-1, 18) as well as the *evidence* (R-4, 14) *relied upon in support thereof* disclose that the petitioner was basing his claim of denial of constitutional rights on the type of proof first fully recognized in Neal v Delaware and later followed with unerring zeal."

The statement that the petitioner relied *upon evidence* on this motion challenging the array of petit jurors put upon him at his second trial on June 24, 1954, is untrue and not based upon any fact inside or outside the record. There is nothing in or out of the record which would even justify such an opinion or conclusion.

The very gist of this appeal is that the petitioner in a timely motion prior to pleading to the merits of an indict-

ment charging him with a capital felony, made a motion to quash and set aside the venire and panel of petit jurors that was put upon him on June 24, 1954, from which qualified members of the Negro race, by a scheme, device and plan, knowingly and intentionally pursued by the officials of the jurisdiction, had been eliminated systematically and arbitrarily (R-18, 23), and that after so pleading, the motion was dismissed on demurrer. No evidence was permitted. The question of whether the petitioner's evidence was sufficient to prove the allegations of fact are not before this Court, for the simple reason that there was no evidence. The petitioner contends that he was denied due process of law and equal protection of law in violation of the 14th Amendment, because he was prevented by the dismissal of his motion on demurrer, from submitting evidence to prove that a fundamental requisite under the United States Constitution requiring that he have "equal protection of the law" in the selection of trial jurors, was denied him.

The assertion that "the evidence relied on in support thereof" is an untrue statement. The facts are that the petitioner had subpoenaed fifty-three (53) witnesses to prove the allegations in his petition, and that the subpoenas were issued by the Clerk of the Superior Court of Cobb County ten (10) days prior to the petitioner's second trial. The ruling of the Court prevented the petitioner from examining these witnesses. The petitioner would have, if he had been permitted to place in the record any proof in support of his allegations, relied only in part upon what the young writer of the brief for the State of Georgia is pleased to call "the classic type proof of the Neal case." The petitioner was prepared, however, to go much, much further into proof and to show the type of "scheme and device purposely and systematically practiced by the officials of the County" (R-22, 32-33) who eliminated Negroes from

the venire and panels of trial jurors that were put upon the petitioner on June 22, 1954 and which "scheme and device" was used to limit the number of Negroes whose names were in the jury boxes to six—three of whom were eighty-two (82) years of age, sick, deaf and physically debilitated, one of whom did not reside in the County and two of whom were sixty-two (62) years old. The petitioner was prepared to prove by the fifty-three witnesses the elaborate details of the scheme and device by which the selection of juries in the jurisdiction was manipulated in violation of the equal protection clause of the 14th Amendment. The ruling of the Court, which constitutes the very basis of this appeal, prevented this petitioner from submitting evidence in support of his allegations. The evidence cited by the respondent State of Georgia (R. 4, 14) does not relate to proof on the petitioner's challenge to the array of petit (trial) jurors put upon him at his second trial on June 22, 1954, but it relates exclusively and solely to the evidence submitted to the Court in support of his motion to quash the indictment when the same was heard on October 30, 1953, at the time of the first trial of the petitioner. As to that evidence, the Supreme Court of Georgia, in its decision of reversal in 210 Georgia at pages 78, decided on May 11, 1954, did not consider the same, but ruled that the petitioner's motion was too late after indictment, and that it was incumbent upon this petitioner, with or without counsel, to raise his objection *prior* to *indictment*. That ruling is being challenged by the petitioner in this appeal, and the evidence was placed in the record to emphasize the fact that an adjudication upon the sufficiency of that evidence, even if the State Supreme Court had considered it, which it did not, as it applied to the motion to quash the indictment, which was returned on October 23, 1953, and heard on October 30, 1953, could not have constituted sufficient basis to dismiss petitioner's motion challenging the array

of petit jurors put upon him at his second trial on June 22, 1954, on the grounds of *res adjudicata*. The petitioner disputes, denies and condemns any statement or implication; if such is legitimately gathered from the respondent's brief, that he relied *upon proof* in support of his motion challenging the array of petit jurors put upon him on June 22, 1954, and asserts upon the contrary, that one of the major premises of his appeal is based upon the fact that the Court by its ruling prevented the presentation of *any* evidence to support the allegations of fact contained in his motion.

1(d)

The Court's attention is next directed to footnote 8 appearing on page 11, of the brief of the respondent State, set out as follows:

> "The records of court show that since 1952, Negroes have frequently served on petit juries, and several times on the grand jury. In addition, several more were called for grand jury service but were excused on their own request. At one trial during this year, three Negroes served on one jury trying a case."

If the above quoted footnote is an attempt to now dispute by facts any of the allegations contained in the petitioner's motion challenging the array of trial jurors put upon him on June 22, 1954, at his second trial; the same is improperly inserted into the State's brief, and this Court, no doubt, will not consider the same. The statement, however, is interesting and replete with meaningful content if analyzed and placed in proper context. No Negro has served on a grand jury; as far back "as the memory of man runneth not to the contrary", in the jurisdiction where the petitioner was indicted on October 23, 1953.

The fact that three Negroes who are 84 years old in 1955

were selected by the Jury Commissioners from the yellow sheets in the Tax Collector's office on which Negro tax returns are maintained, to have their names in the grand and petit jury boxes, at least, raises questions as to deliberate and conscious manipulation of a scheme and device to limit the potential Negro jurors, and to flagrantly violate the spirit of the "equal protection clause." It taxes the credulity of any person to believe that a bona fide effort to comply with the constitutional requirement was made by the Jury Commission. The fact that four Negroes out of the five who could legally serve whose names appeared in a jury box containing 2,500 names of white grand and petit jurors were drawn and summoned during the week of October 26, 1953, the week in which the petitioner was first tried (page 9 of State's brief), is significant, in view of the fact that this petitioner was arrested late Tuesday, October 20, 1953, indicted Friday morning, October 23, 1953, and attorneys appointed on Saturday, October 24, 1953. Note the allegations of the motion to quash the indictment (R-2), particularly the allegations of paragraphs 6 and 9. Any one familiar with the activities around and the intelligence system of a rural court house would be rather naive to conclude that the two 82-year-old jurors and the two 62-year-old jurors were summoned in the normal routine manner.

The facts as set out in the footnote, however, should not be considered, if for no other reason, because in footnote 6 on page 10 of the State's brief, it is admitted that the lists were resided in October, 1954, four months after the Court denied the petitioner the right to show by evidence that as to the *venire and panels of petit jurors put upon him on June 22, 1954*, qualified Negroes had been arbitrarily and systematically excluded from the panels because of their race and color as the result of a deliberate

scheme and device practiced by the officials of the jurisdiction.

The facts, cited in the said footnotes 6 and 8, if true, reveal the consciousness on the part of the officials who choose names of persons for placement in the jury box and those who select the venires and panels of jurors that, as to this petitioner, the boxes existed in violation of the "due process clause" on October 23, 1953, and on June 22, 1954. What has been done in the jurisdiction since October 1954, when it was decided by the officials that further revision should be made, would hardly be sufficient to justify permitting the violation of this petitioner's constitutional rights to go unvindicated.

Whether there is or is not a genuine bona fide compliance with the constitutional mandate in Cobb County at this time will possibly arise, if this case is remanded for another trial. Possibly such evidence as the State alludes to in footnotes 6 and 8 will become admissible and be evaluated and weighed in the light of the evidence submitted by this petitioner upon a future motion filed by him. At least, the petitioner would in such an eventuality be permitted to introduce evidence and cross-examine the Jury Commissioners along the lines suggested in the *Cassell* case, *supra*. At this point, he has not been able to do this. This appeal, in part, hinges around the fact that his efforts to prove by evidence the deprivation of a fundamental constitutional right have, by various means, been denied him. The question of weighing and evaluating evidence is not before the Court. The motion challenging the array of petit jurors was dismissed on motion. The question is: Is the pleading sufficient to withstand a demurrer? Assuming, and it must be assumed, that the allegations of the petitioner's motion challenging the array of petit jurors are true, did he timely and adequately raise the depriva-

tion of a fundamental constitutional right? If so, the Court should not have dismissed the motion filed on June 22, 1954, before hearing or allowing any evidence to be introduced by the petitioner.

1(e)

The attention of this Court is directed to the lower part of page 24 of the brief filed by the respondent State of Georgia, set out as follows:

> "Of course, where a defendant did not have the opportunity of challenging the grand jury, as where it was empanelled and sworn prior to the commission of the offense, the objection may be raised by plea in abatement or other procedure provided by the State. *Carter* v. *Texas* (1900) 177 U.S. 442, 44 L. Ed. 839, 20 S. Ct. 687."

This petitioner denies and disputes the implication that might be drawn from the above statement. Petitioner shows that the grand jury that indicted the petitioner had been drawn, empanelled and sworn prior to the date on which the alleged offense occurred. Petitioner shows that *he did not have an opportunity to challenge the grand jury* at any time prior to October 30, 1953, the date on which he did challenge the grand jury which indicted him. He shows further that the records of the Superior Court of Cobb County, Georgia, in Book ZZ thereof, shows that the names of the grand jurors which indicted him were drawn and their names recorded on October 1, 1953. The grand jurors that indicted this petitioner were empanelled and sworn on October 12, 1953, eight days before the alleged offense for which the petitioner was indicted occurred. This fact is recorded in the Minute Book of Cobb Superior Court, Book ZZ, at page 209.

The grand jury which indicted this petitioner was dismissed on October 19, 1953, and this fact is recorded in Minute Book ZZ, hereinbefore referred to.

On October 21, 1953, the Judge of the Superior Court of Cobb County ordered the grand jury which had been empanelled and sworn on October 12, 1953, reconvened, and recited in his order that certain persons were in the Jail of Cobb County against whom indictment would be presented. The petitioner, Amos Reece, was *not named* as one of those persons. This order is recorded in Minute Book ZZ, page 259, of the Cobb County Superior Court Records.

In accordance with the aforesaid order, the grand jury reconvened on October 23, 1953, and the petitioner was indicted for a capital felony. This fact is recorded in Minute Book ZZ, *supra*.

The grand jury which indicted the petitioner was selected on October 1, 1953; it was empanelled and sworn on October 12, 1953; it was ordered reconvened on October 21, 1953; it reconvened and indicted the petitioner on October 23, 1953.

The alleged offense was committed on October 20, 1953; the petitioner was lodged in the jail on October 20, 1953. He remained therein, without counsel, until October 24, 1953.

If the petitioner were as wise and as learned as the State in its brief unrealistically assumes that he must be, he had a right to rely upon the order reconvening the grand jury, which did not name him as one of those against whom an indictment would be presented. If he had been assigned counsel during the two-day interval, the counsel could have relied upon the order reconvening the grand jury of the County. However, the petitioner bases his appeal, in so far as it applied to the ruling of the Court on the motion to quash the indictment that was filed and determined in

the trial court on October 30, 1953, on the proposition that under the Constitution of the United States, where one claims that a fundamental requisite arising under the 14th Amendment is lacking in the mode and method of procedure whereby he is about to be tried for a capital felony, that in a state court, his *plea must be entertained* and that he must be permitted to introduce evidence to prove that his rights under the 14th Amendment are being denied him. In this case, this illiterate Negro, of low mentality, was in jail, without a lawyer; the grand jury already had been drawn, sworn and empanelled, and within two days of the commission of the offense, he was indicted by the grand jury which was suddenly reconvened after being dismissed, and the State of Georgia says:

> "You should have challenged the Grand Jury prior to the indictment and it makes no difference whether you were represented by counsel or not; and the evidence as to discrimination against qualified members of your race in the selection of persons for jury duty in the jurisdiction where you were tried will not be weighed or evaluated because you raised the issue too late."

The demands of the "due process" clause and "equal protection" clause of the 14th Amendment are stronger than any such procedure in a state jurisdiction. State procedure, and the modes and practices pursued in State courts, must of necessity be adapted to the demands of "due process" and "equal protection" as those concepts are expounded by this Court.

II.

Certain assumptions as to the legal procedure required by Georgia practice relating to the time within which an

accused may bring a motion to quash an indictment are made in the brief filed by the State of Georgia. Certain Georgia cases are cited as authority for the legal assumptions made.

All of these assumptions and cases relate solely to that portion of the petitioner's appeal which deals with his first trial which was had on October 30, 1953, and relate to the motion to quash the indictment which was filed by this petitioner on October 30, 1953. The State in its brief does not seriously contend that it was proper to dismiss the petitioner's motion challenging the venire and panels of petit jurors which were put upon him at his second trial on June 22, 1954. However, it is contended herein that the cases cited by the State in its brief as authority that the petitioner's motion to quash the indictment was filed too late where the same was filed after the indictment, do not sustain the State's position. All of these cases are plainly distinguishable from the facts in this case. There are other cases in Georgia which have recognized that where the petitioner predicates his motion to quash an indictment upon grounds which arise under and by virtue of the "equal protection" clause of the United States Constitution, the statutory modes of procedure relating to the usual pleas where objections are made to one juror or to more than one juror upon statutory grounds are not applicable to a constitutional plea arising under the 14th Amendment. These matters are dealt with hereinafter.

The State in its brief, on pages 19, 20 and 21, cites many Georgia cases. All of the cases cited deal with the time within which a defendant in a criminal case may by a proper plea in abatement move to quash an indictment on which a specific juror was sitting who for statutory reasons was disqualified, or where there had been some administrative laxness in following the regulatory procedure required for

the empanelling and summoning of the grand jurors. None of these cases deal with a plea made by a defendant whose claim is that he was being denied "equal protection" of law and "due process" of law under the 14th Amendment.

On Page 19, the State cites the case of *Williams* v. *The State* in the 69th Ga. at page 13, headnote 5(c) and the case of *Lee* v. *The State*, 69th Ga. at page 205. A casual reading of these two cases discloses that they deal with matters of procedure wholly distinct from and unrelated to any manner raised in this petitioner's appeal. Both cases deal with statutory objections to specifically named grand jurors, and the objections were raised for the first time after conviction. The *Williams* case, *supra*, recognizes that a defendant must have some notice that his case will be considered by a specific grand jury and must have some opportunity to prepare a proper plea. (See headnote 5(c) of the *Williams* case, supra.)

The state relies heavily upon the case of *Parris* v. *The State*, 125 Ga. at page 777. A casual reading of the *Parris* case reveals that the objection therein was to one grand juror, and his objection was one which the Court defined as "proper defectum." The *Parris* case, *supra*, incorporated and cites most of the cases referred to in the State's brief.

It is also significant that in headnote 3 of the *Parris* case, *supra*, the Supreme Court of Georgia used this language: "Unless it appears that he did not have full notice or opportunity to make the challenge at the time (before indictment) . . ." Applying this principle to the petitioner's plea to quash the indictment because a fundamental requisite arising under the Constitution of the United States was lacking to the facts which obtained on October 30, 1953, can it be said that this petitioner, even if this rule of procedure

is applicable in the petitioner's case, had full notice and opportunity to make his challenge prior to indictment. The facts are that the petitioner was arrested on the evening of the 20th of October, 1953, lodged in the common jail and was without an attorney. On October 21, 1953, the grand jury which had been empanelled and sworn on October 12, 1953, and dismissed on October 19, 1953, was reassembled and recalled for October 23, 1953, and the petitioner was indicted on October 23, 1953. In the Judge's order reassembling the grand jury, certain persons were named whose cases would be considered by the grand jury, but the petitioner's name was not included therein. It is urged herein that applying the rulings of the Supreme Court of Georgia to the facts in the petitioner's case and eliminating the broader aspects of the constitutional problem arising under his plea, his motion to quash was timely brought, unless all of these previous cases cited *supra* were overruled in the case of *Reece* v. *The State*, 210 Ga. page 578, decided on May 11, 1954.

The contention of the petitioner, as this appeal relates to the motion to quash the indictment, is that the Supreme Court of Georgia, in its ruling in the *Reece* case, *supra*, denied the petitioner "due process" of law and "equal protection" of law under the 14th Amendment of the Federal Constitution, because the effect of that ruling was to deprive him of showing that qualified members of his race had been discriminated against in the composition of the jury list from which the grand jury that indicted him was drawn, and that the effect of that ruling, if permitted to stand, would be tantemount to permitting a state by a sophisticated method of procedure to deny a defendant accused of a capital felony the right to the aid and benefit of counsel as that right is embraced within the "due process" clause of the 14th Amendment.

This petitioner contends that he did at the proper time by a pleading which was not demurrable assert the deprivation of a fundamental constitutional right arising under the "equal protection" clause and the "due process" clause of the 14th Amendment of the Constitution of the United States. He further contends that any State procedural device which would deprive him of submitting evidence to prove the deprivation and prevent him from making a record in the court below is itself contrary to the "due process" clause of the 14th Amendment. This petitioner contends that any ruling, whether made by the trial court or by the Supreme Court of Georgia, that it was incumbent upon him to know all of the niceties of Georgia procedure and to proceed within twenty-eight hours of his arrest to prepare a written motion without the aid of counsel, is contrary to the "due process" clause of the 14th Amendment of the United States Constitution, because the effect of such ruling is to deprive him of the benefit and aid of counsel which is a right embraced within the "due process" clause. This petitioner further contends that the 14th Amendment is paramount to any state rule of procedure, whether the same be embodied in statute or by judicial opinion. For the law to be otherwise would render the 14th Amendment valueless in so far as protecting personal liberty.

In several of the cases cited by the State in its brief, the term "*propter defectum*" is used. It is insisted by this petitioner that the terms "*propter defectum*" and "*propter affectum*" cannot be properly applied to a motion to quash an indictment or to a motion to set aside the venire and panels of trial jurors where the grounds of the motion arise under and by virtue of the 14th Amendment of the United States Constitution. The concepts which gave rise to the "equal protection" clause have no historical or logical

connection with the common law modes of procedure or the characterization of those modes of procedure which dealt with the methods by which an individual juror's competency to serve could be tested under statutory or customary grounds. These descriptive terms applied to such customary or statutory modes of procedure arose in England long before the emergence of the historical reasons which gave birth to the 14th Amendment. But, if the predilection of the legal mind for using ancient vessels in which to carry new concepts must be fused, and if in order to tickle the ego of the legal mind, we must continue to use these terms in situations of this kind, then we can turn to the *Parris* case, *supra*, and to the case of *Hawkins* v. *The State* (1952), 86 Ga. pages 872 and 874; *Avery* v. *The State*, 209 Ga. 116-117.

The *Hawkins* case, *supra*, held:

> "Where after the return of the indictment, the defendant seeks to object to *one of the jurors propter defectum*, it is incumbent upon him to show that he did not have the opportunity to raise the objection prior to the indictment."

In the *Avery* case, *supra*, a case which this Court later reversed, in reviewing the facts of the case, the Supreme Court of Georgia stated:

> "Avery was arrested on October 29, 1950, for the offense of rape in Walker County, and was committed to jail. At the February, 1951, term of the Walker Superior Court *he was informed by the Solicitor General of the Judicial Circuit in Walker County* that an indictment charging him with rape would be presented for grand jury action *during that term of court*."

An attorney was thereupon appointed for Avery, and Avery, prior to the indictment and after receiving affirma-

tive notice from the Solicitor General that an indictment would be presented, filed a written challenge to the array of grand jurors. The Avery case recognized and adhered to the customary procedure in Georgia where one is charged with a capital felony, to notify him that an indictment would be presented against him at a specific term of the grand jury.

The case of *Crumb* v. *The State*, 205 Ga. page 547, is a case where Crumb was indicted by a grand jury for a misdemeanour, where Crumb was on bond, but yet he filed prior to being placed on trial a motion to quash the indictment and a challenge to the array of petit jurors put upon him. The identical procedure used in the *Crumb* case, *supra*, was used in this petitioner's case at his second trial on June 22, 1954.

Other cases arising in Georgia in which the writer of this brief represented the defendants and where a claim was made prior to going to trial that a fundamental requisite arising under the Constitution of the United States was lacking in the method by which the grand jury and petit jury was selected are *Lorenza Cofield* v. *The State* in the Superior Court of Troup County and *Isaiah Grimes* v. *The State* in the Superior Court of Walton County. Both of these cases were murder cases. These cases did not go to the Supreme Court of Georgia, but the trial court in both cases recognized the right of the defendants to proceed to quash the indictment and to set aside the venire of trial jurors in one and the same proceeding after the indictment had been returned.

In the *Cofield* case, after the motion to quash had been filed, and while the evidence was being submitted to the court to sustain the allegations, Cofield withdrew his motion and pleaded guilty to manslaughter.

In the *Grimes* case, the Trial Judge abated the action

and the Jury Commissioners of Walton County, Georgia, were reassembled for the purpose of reestablishing the grand and petit jury lists of the County.

The attention of this Court is now directed to pages 29 through 32 of the brief filed by the State of Georgia in which they characterize as "novel" the contention of the petitioner that he should have been permitted to prove as one of the various elements in the pattern of discrimination against members of his race in the selection of jurors in the jurisdiction where he was tried, the fact that there were at least one hundred (100) members of his race who from every viewpoint were qualified to act as jury commissioners of the county, but that they had been deliberately, systematically and purposely prevented from serving as members of the jury commission because of their race and color.

The facts, as meager as they are, upon this particular feature of this case, demonstrate that the presence of qualified Negroes upon the jury commissions in the jurisdiction where Negroes constitute a large segment of the population will obtain an objective compliance with the spirit of the constitutional requirement. The mores of the people and the patterns of thought in the South will prevent any objective selection of members of the Negro race for participation in the administration of justice as jurors and grand jurors so long as qualified members of the Negro race are excluded from membership on the jury commissions. The quotation of isolated statements torn out of context from judicial decisions is not an effective means of meeting and rebutting this contention. An attempt to equate an all-white jury commission in the rural South to the status of this Court does not comport with reality.

In Georgia, jurors are selected from the persons meeting

the legal qualifications whose names appear on the tax digests of the county. In this particular jurisdiction, the names of all the Negro taxpayers are maintained in separate books marked "Negro" and maintained on yellow buff paper in order to segregate the Negro taxpayers from the white taxpayers. An all-white jury commission, as a matter of fact, will be familiar with the white persons in the County who would make the best jurors. They would not be familiar with the Negro persons. An all-white jury commission would select from the white pages of the tax digest the names of white persons to be placed in the jury boxes of the county and then on reflection, and knowing that this Court had ruled that in a jurisdiction where Negroes comprise a distinct racial minority, it would violate "equal protection" of the law to discriminate against qualified Negro persons because of their race and color in the selection of names to be placed in the jury boxes, would then turn to that portion of the tax digest containing the yellow sheets and pick a token number of members of the Negro race and put them in the jury boxes. In order to make the matter of discrimination more elusive as a matter of proof, they would pick the names of Negro persons whom they knew to be aged and infirm or those whom they knew to be engaged in occupations that would prevent them from serving. The facts in this case show that that is exactly what happened. If we are realistic about it, we can easily see that the presence of one or two qualified Negroes on such jury commissions would eliminate the possibility of the conscious selection of an infinitesimal number of Negro names to be placed in the jury boxes of a particular jurisdiction. Qualified Negro member or members of a jury commission would know the members of their race who were competent and qualified to act as jurors, and they would know those who were aged, sick

and infirm and those who were engaged in occupations that would prevent them from serving.

A member of a grand jury in Georgia functions in a capacity that makes him during the period of his service a participant on the ground level not only in the administration of justice, but also in the administration of local government. The operations of the various governmental agencies of the municipalities and the agencies of the county come under the surveillance of the grand jurors. In many counties, they select members of the school board and perform many functions other than the routine return of indictments presented to them by the solicitor general. The presence of members of the Negro race on jury commissions would insure an objective compliance with the constitutional mandate and would end the sophisticated evasions that are now practiced. This is simple logic, but it is a realistic approach.

Conclusion

It is respectfully urged upon the Court that the case against this petitioner be remanded to the court below with proper instructions.

Respectfully submitted,

DANIEL DUKE,
Counsel for Petitioner.

October 31, 1955
301-2 Volunteer Building
Atlanta 3, Georgia.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955

No. 112

AMOS REECE,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

INDEX

	Page
I. OPINIONS BELOW	1
II. JURISDICTION	2
III. QUESTIONS PRESENTED	2
IV. STATEMENT OF THE CASE	3
V. ARGUMENT	5
VI. CONCLUSION	33

TABLE OF AUTHORITIES

CASES — Page

Agnew v. United States (1897) 165 U.S. 36 . . . 24, 27

Alston v. School Board of Norfolk (1940 CA 4th) 112 F2d 992, 130 ALR1506 . . . 31, 32

Anderson v. State (1913) 70 Tex.Cr.R. 250 157 S.W. 150 . 24

Armentrout v. State (1939) 138 Tex.Cr.R. 238, 135 S.W.2d 479 . . . 23

Arnold v. United States for use of Guimarin (1923) 263 U.S. 427 . . . 14

Baldwin v. Kansas (1889) 129 U.S. 52 . . . 28

Ballard v. United States (1946) 329 U.S. 187 . . . 31

Barbour v. Georgia (1919) 249 U.S. 454 . . . 28

Bostwick v. Brinkerhoff (1882) 106 U.S. 3 . . . 13

Brooks v. State (1912) 12 Ga.App. 104, 76 S.E. 765 . . . 20

Brown v. Allen (1953) 344 U.S. 443 . . . 5, 9, 11

Brown v. Mississippi (1936) 297 U.S. 278 . . . 29

Brown v. State (1910) 8 Ga.App. 397, 69 S.E. 37 . . . 20

Bruce v. Tobin (1917) 245 U.S. 18 . . . 13

Burns v. State (1940) 191 Ga. 60, 11 S.E.2d 350 . . . 20

Cabaniss v. State (1910) 8 Ga.App. 129, 68 S.E. 849 . . . 20

Cain v. State (1905) 86 Miss. 505, 38 So. 227 . . . 22

Canter v. American Ins. Co. (1830) 3 Pet. 307 . . . 18

Carondelet Canal & Navigation Co. v. Louisiana (1914) 233 U.S. 362 . . . 17

Carter v. Texas (1900) 177 U.S. 442 . . . 5, 25, 28

Cassell v. Texas (1950) 339 U.S. 282 . . . 8

Clark v. Williard (1934) 292 U.S. 112 . . . 18

Collins v. Miller (1920) 252 U.S. 364 . . . 13, 18

Cohen v. Beneficial Industrial Loan Corp. (1949) 337 U.S. 541 . . . 14

Commonwealth v. Craig (1902) 19 Pa.Super.Ct. 81 . . . 23

Department of Banking v. Pink (1942) 317 U.S. 264 . . . 14

Dixon v. State (1896) 74 Miss. 271, 20 So. 839 . . . 22

Edleman v. California (1953) 344 U.S. 357 . . . 27

Edwards v. State (1905) 121 Ga. 590, 49 S.E. 674 . . . 20

CASES

	Page
Elyea, Inc. v. Cenker, 184 Ga. 179, 190 S.E. 585	16
Evans v. State (1915) 17 Ga.App. 120, 86 S.E. 286	20
Ex Parte Traxler (1945) 148 Tex.Cr.R. 550, 189 S.W.2d 749	23
Ex Parte Virginia (1880) 100 U.S. 313	30
Fisher, et al, v. State (1894) 93 Ga. 309, 20 S.E. 329	20
Folds v. State (1905) 123 Ga. 167, 51 S.E. 305	20
Flowers v. State (1949) 209 Miss. 86, 41 So.2d 352	22
Foster v. Illinois (1947) 332 U.S. 134	28
Franklin v. South Carolina (1910) 218 U.S. 167	30
Frey v. State (1928) 109 Tex.Cr.R. 168, 3 S.W.2d 459	23
Georgia Railway & Power Co. v. Decatur (1923) 262 U.S. 432	16
Gospel Army v. Los Angeles (1947) 331 U.S. 543	13, 14
Grand Rapids and Indiana Railroad Co. v. Butter (1893) 159 U.S. 87	28
Hale v. Kentucky (1938) 303 U.S. 613	5
Hardware Dealers Insurance Co. v. Glidden Co. (1931) 284 U.S. 151	28
Hartford Life Ins. Co. v. Johnson (1919) 249 U.S. 490	27
Hawkins v. State (1952) 86 Ga.App. 872, 72 S.E.2d 778	20
Hebert v. Louisiana (1926) 272 U.S. 312	28
Hedgebeth v. North Carolina (1948) 334 U.S. 806	28
Hernandez v. Texas (1954) 347 U.S. 475	5, 31
Hickox v. State (1923) 95 Tex.Cr.R. 473, 253 S.W. 823	24
Hill v. Texas (1942) 316 U.S. 400	5, 8
Hollins v. Oklahoma (1935) 295 U.S. 394	5
Hunter v. State (1927) 108 Tex.Cr.R. 142, 299 S.W. 437	24
Jacobi v. Alabama (1902) 187 U.S. 133	28
Johnson v. Keith (1886) 117 U.S. 190	13
Johnson v. Muelberger (1951) 340 U.S. 581	17
Jones v. State (1949) 154 Tex.Cr.R. 241, 226 S.W.2d 437 (1)	23
Lascelles v. State (1882) 90 Ga. 347, 16 S.E. 945, 35 Am.St.R. 216	20
Layton v. Missouri (1902) 187 U.S. 356	28

CASES

	Page
Lee v. State (1883) 69 Ga. 705	20
Lisenba v. California (1941) 314 U.S. 219	28
Lott v. State (1948) 204 Miss. 610, 37 So.2d 782	22
Louisiana Navigation Co. v. Oyster Commission (1912) 226 U.S. 99	18
Manning v. Carroll, 206 Ga. 158, 56 S.E.2d 278	16
Marbury v. Madison (1803) 1 Cranch 137	31
Market Street Ry. Co. v. R. R. Commission of California (1945) 324 U.S. 548	14
Martin v. State (1952) 157 Tex.Cr.R. 210, 248 S.W.2d 126	23
Martin v. Texas (1906) 200 U.S. 316	5, 30
Neal v. Delaware (1881) 103 U.S. 370	5
Nevada-California, Oregon Railway Co. v. Burris (1917) 244 U.S. 103	28
Norris v. Alabama (1935) 294 U.S. 587	5
Ownbey v. Morgan (1921) 256 U.S. 94	32
Palko v. Connecticut (1937) 302 U.S. 319	29
Parris v. State (1906) 125 Ga. 777, 54 S.E. 751	20
Patton v. Mississippi (1947) 332 U.S. 463	5
People v. Arnold (1860) 15 Cal. 476	21
People v. Block (1947) 74 N.Y.S.2d 430, 190 Misc. 245	22
People v. Munday (1920), 393 Ill. 191, 127 S.E. 364	21
People v. Moice (1860) 15 Cal. 329	21
People v. Scannell (1902) 75 N.Y.S. 500(4), 37 Misc. 345	23
Pierre v. Louisiana (1939) 306 U.S. 354	5
Pope v. Atlantic Coast Line R. Co. (1953) 345 U.S. 379	18
Ransom v. State (1906) 116 Tenn. 355, 96 S.W. 953	23
Reece v. State, 211 Ga. 339, 85 S.E.2d 773	1, 15
Reece v. State, 210 Ga. 578, 82 S.E.2d 10	1, 12, 15, 19
Richfield Oil Corp. v. State Board of Equalization (1946) 329 U.S. 69	14, 18
Rivers v. State (1906) 117 Tenn 235, 96 S.W. 956	23
Rogers v. Alabama (1904) 192 U.S. 226	28
Russell v. Mohr-Weil Lumber Co. (1902) 115 Ga. 35, 14 S.E. 275	15
Shope v. State (1898) 106 Ga. 226, 32 S.E. 140	20

CASES

	Page
Simpson v. State (1899) 110 Ga. 249, 34 S.E. 204	20
Sisk v. State (1953) 232 Ind. 214, 110 N.E.2d 627	22, 25
Smith v. Texas (1940) 311 U.S. 128	5
Smith v. Mississippi (1896) 162 U.S. 592	5
Smith v. State (1924) 97 Tex.Cr.R. 6, 260 S.W. 602	24
Smith v. State (1940) 62 Ga.App. 498, 8 S.E.2d 797	20
Smith v. State (Tex.Cr.R. 1900) 56 S.W. 54	24
Snowden v. Hughes (1944) 321 U.S. 1	31
Snyder v. Massachusetts (1934) 291 U.S. 97	29
Stapleton v. State (1916) 19 Ga.App. 36, 90 S.E. 1029	20
State v. Corcoran (1900) 7 Idaho 220, 61 P. 1034	21
State v. Crisinger (1923) 197 Iowa 613, 195 N.W. 998	22
State v. Forbes (1924) 124 Miss. 425, 98 So. 844	22
State v. Ingalls & King (1864) 17 Iowa 8	22
State v. Ruffu (1930) 8 N.W.Misc. 392, 150 A. 249, 252	22
State v. Seidler (1924) 267 S.W. 424	22
State ex rel Graves v. Sothern (1939) 344 Mo. 14, 124 S.W.2d 1176	22
State v. Welch (1862) 33 Mo. 33	22
Staton v. State (1923) 93 Tex.Cr.R. 356, 247 S.W. 356	24
Swift & Co. v. Compania Columbina Del Caribe (1950) 339 U.S. 684	14
Tarrance v. Florida (1903) 188 U.S. 519	27
Thomas v. Texas (1909) 212 U.S. 278	30
Thorington v. City Council of Montgomery (1893) 147 U.S. 490	27
Tillman v. State (1915) 121 Ark. 322, 181 S.W. 890	21, 25
Tompkins v. State (1912) 138 Ga. 465, 75 S.E. 594	20
Tracy v. Holcombe (1861) 24 How. 426	13
Tucker v. State (1910) 135 Ga. 79, 68 S.E. 786	20
Turner v. State (1886) 78 Ga. 174	20
Tyson v. State (1943) 146 Tex.Cr.R. 128, 171 S.W.2d 496	23, 25
United States v. Butler (1877) Fed.Cas.No. 14,700(3)	24
United States v. Gale (1883) 109 U.S. 65	24, 26

CASES

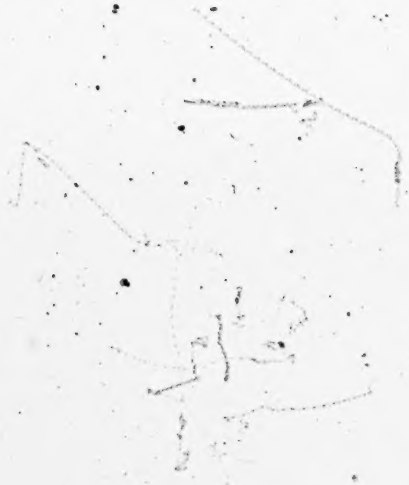
	Page
United States v. River Rouge Improvement Co. (1926) 269 U.S. 411	14
United States v. White (1838) Fed.Cas.No. 16,679, 5 Cranch C.C. 457	24
Varble v. Whitecotton (1945) 354 Mo. 570, 190 S.W.2d 244	22
Walden v. Nichols, 204 Ga. 532, 50 S.E.2d 105	16
Walker v. Rowe et al., 41 Ga.App. 769, 154 S.E. 722	15
Walker v. State (1925) 98 Tex.Cr.R. 663, 267 S.W. 988	24, 25
Webb v. State (Tex.Cr.R. 1897) 40 S.W. 988	24, 25
Welch v. State (1912) 66 Tex.Cr.R. 525, 147 S.W. 572	24
West v. State (1917) 19 Ga.App. 142, 91 S.E. 216	20
Williams v. State (1882) 69 Ga. 11	19
Williams v. State (1943) 146 Tex.Cr.R. 294, 174 S.W.2d 261	23
Wilson v. State (1931) 117 Tex.Cr.R. 63, 36 S.W.2d 733, 735	23
Winn v. State (1940) 138 Tex.Cr.R. 202, 135 S.W.2d 118	23
Wolfson v. United States (1900) 101 F. 430, 102 F. 134	24
Wright v. State (1941) 143 Tex.Cr.R. 447, 158 S.W.2d 787	23
Young v. Ragen (1949) 337 U.S. 235	28

STATUTES

Federal	
28 USCA §1257 (3)	2
28 USCA §2101	12
State	
Georgia Code Ann., §59-101	29
59-106	10, 11, 29
59-108	29
27-405 (1953 Rev.)	4
38-415 (1954 Rev.)	4

MISCELLANEOUS

43 Columbia L. Rev. 1002	18
Revised Rules of the Supreme Court, Rule 22	12



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1955

No. 112

AMOS REECE,
Petitioner

vs.

THE STATE OF GEORGIA,
Respondent.

On Writ of Certiorari to
The Supreme Court of Georgia

BRIEF OF RESPONDENT

I.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia reversing petitioner's conviction on the first trial is reported below as *Reece v. State*, 210 Ga. 578, 82 S. E. 2d 10. The opinion of that court affirming petitioner's conviction on the second trial is reported as *Reece v. State*, 211 Ga. 339, 85 S. E. 2d 773. A motion for rehearing was denied on February 17, 1955. The decisions and judgments of the Superior Court of Cobb County, the trial court below, are unreported. This court granted certiorari May 31, 1955 (R. 28).

II.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under 28 U. S. C. A., §1257 (3), wherein it is sought to review by certiorari a final judgment of the highest court of a state, to wit, the Supreme Court of Georgia. Respondent respectfully denies the jurisdiction of this Court to consider petitioner's assignment of error relating to the alleged systematic exclusion of Negroes from the grand jury, on the ground that this final ruling was made by the Supreme Court of Georgia on the first appeal of this case more than ninety (90) days from the date of the application for certiorari.

III.

QUESTIONS PRESENTED

1. Whether due process is denied to an accused by a ruling of state practice requiring that challenges to the grand jury indicting him be made prior to the return thereof, where the accused had been arrested and in jail for three days before indictment. An ancillary question which must be determined at the outset is whether or not this Court has jurisdiction to consider this question at all, in view of petitioner's failure to seek certiorari from the final decision of the Supreme Court of Georgia on the first trial adjudicating once and for all the legality of the indictment.

2. Whether petitioner's contentions as to systematic exclusion of members of the Negro race from service on the Board of Jury Commissioners was made at the proper time for consideration by the trial court. Assuming such objection was made at the proper time, the question then must be determined as to whether or

not such a practice constituted a denial of equal protection irrespective of whether or not discrimination as to the actual selection of the jury itself, either grand or petit, was shown.

3. Whether or not petitioner's objections to the trial jury were timely made, and assuming so, whether or not the allegations were sufficient to show a denial of equal protection.

IV.

STATEMENT OF THE CASE

Petitioner is an adult Negro man who stands convicted of the rape of a white woman in Cobb County, Georgia. At the date of commission of the offense, to wit, October 20, 1953, petitioner was an inmate of the Cobb County, Georgia Public Works Camp, serving a sentence of from four to twenty years on each (consecutive) of two counts of assault with intent to rape, and also, four to twenty years on each (consecutive) of two counts of stealing, both of which sentences had been imposed in Cobb Superior Court on February 23, 1945.[1]

The overwhelming evidence was to the effect that petitioner, while working on the roads, stopped at the house of the victim for a drink of water, and finding her alone, committed the offense of rape for which he was convicted.

At both the first and second trials, the State's testimony consisted of positive identification of petitioner by the victim, a confession by petitioner, and unimpeachable circumstantial evidence in several particu-

[1] Petitioner volunteered this information in his unsworn statement made upon his second trial. The specific details were procured from the Georgia State Board of Corrections.

lars.[2] In addition, at the first trial petitioner asserted the defense of insanity, and his own medical witness related the details of a confession made to him by petitioner. At the second trial, however, petitioner presented no evidence other than his unsworn statement.[3]

When the case was called for trial the first time on October 30, 1953, petitioner moved to quash the indictment on the ground that Negroes had been systematically excluded from service on the grand jury indicting petitioner solely because of their race and color. (R. 1-3).

After hearing evidence thereon (R. 4-15) the motion was overruled (R. 4).

On appeal to the Supreme Court, this ruling of the trial court was affirmed on the ground that under Georgia law, an accused must challenge the grand jury indicting him prior to return of the indictment, where he has been arrested, is in jail awaiting trial, and is therefore apprised of the fact that his charges will be considered by a grand jury. (R. 16). However, this same decision of the Georgia Supreme Court found error in the charge, and remanded the case for a new trial. (R. 16, headnote 2). No appeal or application for certiorari was taken from this decision.

When the case came up for retrial in Cobb Superior Court on June 22, 1954, petitioner filed a new motion to quash the indictment and the array of trial jurors put upon him, and to render void the appointment of the grand jury commission. The basis of this motion

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[2] Although not included in the transcript of record printed in this Court, counsel for respondent have furnished the Court with copies of the trial transcript.

[3] See Ga. Code, §27-405 (1953 Rev.); §38-415 (1954 Rev.).

was first, that Negroes had been systematically and arbitrarily excluded from both grand and petit jury service solely because of their race and color in violation of the 14th Amendment, and second, that the superior court judge authorized by law to appoint the jury commissioners had systematically refused to appoint any Negro, solely because of race or color, in violation of the 14th Amendment. (R. 18).

The state demurred to this motion (R. 23), and the demurrer was sustained on appeal, which is sought to be reviewed here.

V.

ARGUMENT AND CITATION OF AUTHORITIES

1. *The Evidence Fails to Show Systematic Exclusion of Negroes From Jury Service.*

Both the allegations of the two motions to quash (R. 1, 18) as well as the evidence (R. 4, 14) relied upon in support thereof disclose that petitioner was basing his claim of denial of constitutional rights on the type of proof first fully recognized in *Neal v. Delaware* (1881) 103 U. S. 370, 26 L. Ed. 567 and later followed with unerring zeal.[4] This system of proof consists of showing that no Negroes have served on juries over an extended period of time, that they constitute an appreciable segment of the overall pop-

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[4] *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687; *Martin v. Texas* (1906) 200 U. S. 316, 50 L. Ed. 497; 26 S. Ct. 338; *Smith v. Mississippi* (1896) 162 U. S. 592, 40 L. Ed. 1082, 16 S. Ct. 900; *Norris v. Alabama* (1935) 294 U. S. 587, 79 L. Ed. 1074; 55 S. Ct. 579; *Hollins v. Oklahoma* (1935) 295 U. S. 394, 79 L. Ed. 1500, 55 S. Ct. 784; *Hale v. Kentucky* (1938) 303 U. S. 613, 82 L. Ed. 1050, 55 S. Ct. 753; *Pierre v. Louisiana* (1939) 306 U. S. 354, 83 L. Ed. 757, 59 S. Ct. 536; *Smith v. Texas* (1940) 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; *Patton v. Mississippi* (1947) 332 U. S. 463, 92 L. Ed. 76, 68 S. Ct. 184; *Hill v. Texas* (1942) 316 U. S. 400, 404, 86 L. Ed. 1559, 62 S. Ct. 1159; *Brown v. Allen* (1953) 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397; *Hernandez v. Texas* (1954) 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667.

ulation and taxpayers of the county, that a sizeable number is qualified to serve, and lastly, a conclusion that the resulting exclusion was therefore based solely on race.

In the instant case, however, the evidence adduced by petitioner shows that in October, 1952, the jury boxes were revised for the express purpose of removing from the jury boxes the effect of any systematic exclusion which may have transpired in intervening years.

On cross-examination of Mr. LeCroy, Clerk of the Superior Court, the following was brought out:

"Q. I will ask you whether or not the jury box has been revised?

A. Yes, sir, under the law the jury boxes are revised every two years.

Q. When was the last time that the jury box was revised in this county?

A. The Jury commissioners began their work in August of 1952, and completed their work, as I recall it, around the first of October.

Q. I will ask you whether or not the revision has removed from the box or from the boxes any distinction as to the color or race of the members whose names are in the boxes?

A. No, sir, there isn't any; there is no distinction.

Q. Is that the revision that took place in 1952, that you described?

A. Yes, sir.

Q. Is there any systematic effort on the part of any one, either the court officials or the jury

commissioners, to systematically exclude persons of the colored race from either the grand or the petit jury?

A. No, sir.

Q. Is there any designation, by color or otherwise, that would attract attention of either a jury reviser or any court official, that would point out to them the distinction in race?

A. No, sir, all the names are listed on the same sort of paper.

Q. Are you present when the court summons both grand and petit jurors?

A. Yes, sir, as a rule.

Q. Have you observed the slips as drawn from the grand jury and petit jury boxes?

A. Yes, sir.

Q. Is there anything there to indicate by color or anything else that would attract the court's attention at all, or the sheriff's attention to the fact that the person being summoned for grand or petit jury service was a white or colored person?

A. No, sir." (R. 9).

The testimony of Mr. Terry, who had served as Acting Clerk, also was to the same effect. (R. 6-8).

In addition, it was brought out by the testimony of Negro witnesses testifying on the behalf of petitioner that within the year, and at that same term of court, they had been summoned for jury duty (Testimony of Ed Austin, R. 5; testimony of Sam Drew, R. 12; testi-

mony of Frank Addison, R. 12; testimony of John Hill, R. 14).

Under the holdings of this Court, the evidence as to what may have been the situation prior to revision of the jury lists became immaterial, and it thereby became the burden of petitioner to show discrimination "by direct evidence based on the statements of the jury commissioners in the very case." *Cassell v. Texas* (1950) 339 U. S. 282, 94 L. Ed. 839, 70 S. Ct. 629.

In the Cassell case, supra, this court noted that approximately eight years prior thereto, it had condemned a course of systematic exclusion based upon the type of proof relied upon here in the case of *Hill v. Texas* (1942) 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, and that accordingly, evidence of what had transpired prior to the Hill case would not be considered on a case arising subsequent thereto, when the jury lists had been revised in an attempt to comply with this Court's decision. In the Cassell case this Court declared:

> "In weighing this matter of custom, we limit ourselves, as do the parties, to the period between June 1, 1942, when *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559, 62 S. Ct. 1159, supra, was decided, and November 1947, when petitioner was indicted." *Cassell v. Texas*, 339 U. S. 282, 285, 94 L. Ed. 839, 846.

The Court then proceeded to hold that discrimination was not shown by the course of conduct subsequent thereto insofar as statistics were concerned, and that discrimination could only be shown with reference to the specific case. This evidence was found by

the Court from testimony of jury commissioners to the effect that they had sought to limit Negroes to proportionate racial representation.

Similarly, in *Brown v. Allen* (1953) 344 U. S. 443, 479, 97 L. Ed. 469, 500, 73 S. Ct. 397, this Court held immaterial evidence of past practices where it was shown that subsequently the jury boxes had been revised, the majority opinion declaring,

> "As this venire was the first drawing of jurors from the box after its purge in July 1949, following the new statute and *Brunson v. North Carolina*, decided here, March 15, 1948 [333 U. S. 851, 92 L. Ed. 1132, 68 S. Ct. 634], the long history of alleged discrimination against its Negro citizens by Vance County jury commissioners is not decisive of discrimination in the present case."

The Court then proceeded to note that the special venire actually contained the names of seven Negroes. In the instant case, the fact has been previously alluded to that four Negroes had been summoned the week of petitioner's trial.

With regard to the retrial of petitioner after reversal of his first conviction by the Georgia Supreme Court, the circumstances are no different, and the same evidence would be applicable. This is so because of two factors. First, although on the second trial the question was raised as to the legality of the petit jury as well as the grand jury, the testimony of the deputy clerk was to the effect that the grand and petit jury boxes (from which names are drawn each term to make up the grand jury and trial jury panels) were prepared in the following manner: First, pursuant to Ga. Code

Ann., §59-106,[5] the jury commissioners selected 25% of the names of male taxpayers from the tax receiver's books to be placed in the petit jury boxes, and from this number so chosen, 25% thereof were selected to be placed in the grand jury boxes (R. 6-7) so it is seen that the grand jury box was made up from the names appearing in the petit jury box, and therefore, evidence as to the former would be relevant with respect to the latter.

Secondly, under §59-106 of the Georgia Code, quoted previously (Footnote 5) the jury lists are revised only every two years unless otherwise directed by the judge of the superior court, so that it is apparent that the jury at petitioner's second trial was drawn from the same boxes used at his first trial.[6]

It is therefore submitted that petitioner failed to carry the burden of proof under the circumstances of this case, where it was shown without contradiction

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[5] Prior to its amendment in 1953 (Ga. Laws 1953, Nov.-Dec. Sess., p. 284) and 1955 (Ga. Laws, 1955, p. 247), Section 59-106, as applicable to this case, read:

"Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

"The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead."

[6] Records in Cobb Superior Court disclose this. The evidence shows that the jury boxes were revised in October 1952 (R. 5, 9), prior to petitioner's indictment on October 23, 1953 (Petition for Certiorari, p. 7), and his trial on October 30, 1953 (R. 1, Petition for Certiorari, p. 7). Petitioner was tried the second time on June 22, 1954 (Petition for Certiorari, p. 7; R. 18) prior to revision of the jury lists in the latter part of 1954.

by petitioner's own witnesses that the jury boxes had been revised for the purpose of eliminating the effect of any existing racial discrimination, and no subsequent course of exclusionary conduct based on race was shown nor any direct evidence submitted as to this specific case. Added to this is the testimony of the Clerk and Acting Clerk that there was no attempt, on revision, to exclude colored persons from service, and that there was no designation by color or otherwise which would disclose to the court officials selecting the jury from the boxes the race or color of the juror whose name was drawn therefrom. (R. 7-8-9).

Moreover, the allegations of both the first and second motion to quash (R. 1, 18) do not show facts from which an unreasonable ratio of white to colored names in the jury boxes could be inferred. The mere fact that according to the 1950 census there were 1,710 male Negro citizens 21 years of age or older does not mean too much, since under Georgia law, jury service at the time of this case was limited to male taxpayers.[7] This Court has previously noted that the tax lists may well have a higher proportion of whites than Negroes, due entirely to causes other than race. *Brown v. Allen* (1953) 344 U. S. 443, 473, 97 L. Ed. 469, 497, 73 S. Ct. 397.

Lastly events transpiring since revision of the jury lists in 195? bear out the fact that the jury boxes have been fairly and legally constituted.[8]

2. *The Question as to the Alleged Systematic Ex-*

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[7] Ga. Code Ann. §59-106, supra, footnote 5.

[8] The records of court show that since 1952, Negroes have frequently served on petit juries, and several times on the grand jury. In addition, several more were called for grand jury service but were excused on their own request. At one trial during this year, three Negroes served on one jury trying a case.

clusion of Negroes From the Grand Jury Is Not Subject to Review Here for Failure to Apply for Certiorari in Due Time.

It is provided in 28 U. S. C. A., §2101, that the time for making application for certiorari to this Court to review the judgment of the highest court of a state in criminal cases shall be as provided for by the rules of this Court. Rule 22 of the Revised Rules requires that the application be made within ninety days from entry of the judgment complained of. The decision of the Supreme Court of Georgia on the first appeal of this case, which determined the question as to composition of the grand jury adversely to petitioner, was rendered on May 11, 1954.[9] Certiorari was applied for on April 12, 1955, almost one year after the first decision of the Supreme Court. It is the contention of respondent that since this issue was forever foreclosed[10] by the first decision of the Supreme Court of Georgia, notwithstanding the fact that petitioner's conviction was therein reversed on a non-constitutional ground, and a retrial had, certiorari should have been applied for from this decision. This necessarily depends upon the question as to whether or not the judgment of the Supreme Court of Georgia finally adjudicating the constitutional issue, but reversing the conviction on a non-federal ground,[11] presented the degree of finality requisite for review under 28 U. S. C. A. §1257(3).

The classical statement as to finality is expressed in

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[9] Reece v. State, 210 Ga. 578, 82 S.E. 2d 10.

[10] At his second trial, petitioner was tried on the same indictment.

[11] The first trial was reversed because of an error in the charge. *See Reece v. State*, supra, Headnote (2a).

Bostwick v. Brinkerhoff[12] (1882), 106 U. S. 3, 27 L. Ed. 73, 74, 1 S. Ct. 15:

> "The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered . . ."

As an application of this rule, it has been held that generally, a judgment of the highest court of a state reversing the trial court below and requiring a new trial is not final so as to be subject to review by this Court.[13] and that a judgment must not only be final, but also complete.[14]

However, this rule is not without exception, for the exception has been expressly recognized that "an adjudication, final in its nature as to a matter distinct from the general subject of the litigation, and affecting only the parties to the particular controversy, may be

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[12] The Bostwick case concerned a situation where an action for negligence had been brought in state court against the Directors of a National Bank, and a judgment overruling a demurrer based on the ground that such a suit could not be maintained in state court, was affirmed, and the case remanded with the direction that defendant be allowed to answer, over. Since the liability of the Directors of a National bank would depend upon federal law, the entire case would be one concerning federal questions, which differs from the instant case in that the only federal questions involved were those ruled on in the first decision of the Supreme Court of Georgia.

[13] *Johnson v. Keith* (1886), 117 U. S. 190, 29 L. Ed. 888, 6 S. Ct. 669. *Tracy v. Holcombe* (1861), 24 How. 426, 16 L. Ed. 742; *Bruce v. Tobin* (1917), 245 U. S. 18, 62 L. Ed. 123, 38 S. Ct. 7; *Gospel Army v. Los Angeles* (1947), 331 U. S. 543, 546, 91 L. Ed. 1662, 1665, 67 S. Ct. 1428.

[14] *Collins v. Miller* (1920) 252 U. S. 364, 370, 64 L. Ed. 616, 618, 40 S. Ct. 347.

reviewed without awaiting the determination of the general litigation."[15]

Next, it is believed that the peculiar situation which here arises with respect to the applicable state law compels the conclusion that the constitutional issue as to the Grand Jury should have been presented to this Court for consideration by certiorari immediately following the State Supreme Court's decision on the first appeal thereon.

Of course, it is not disputed that the mere *designation* by a state court as to the "finality" of its judgments is not binding on this court,[16] but this does not mean that the local law will not be looked to for its *effect* as to the finality,[17] and in any event, the test is whether the "order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."[18]

In the instant case, although petitioner's conviction was reversed because of an error in the trial court's

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[15] *Arnold v. United States for use of Guimarin* (1923), 263 U. S. 427, 434, 68 L. Ed. 371, 375, 44 S. Ct. 144; *United States v. River Rouge Improvement Co.*, (1926), 269 U. S. 411, 413, 70 L. Ed. 339, 943, 46 S. Ct. 144; *Swift & Co. v. Compania Colombina Del Caribe* (1950), 339 U. S. 684, 688, 94 L. Ed. 1206, 1210, 70 S. Ct. 861; *Cohen v. Beneficial Industrial Loan Corp.* (1949), 337 U. S. 541, 546, 93 L. Ed. 1528, 1536, 69 S. Ct. 1221. The Cohen case presented a factual situation somewhat similar in principal to the instant case. The only point ruled upon and which was sought to be reviewed related to the applicability, in federal court in a diversity case, of a state statute requiring a plaintiff to post bond for costs. This, like the question as to the composition of the grand jury returning an indictment, dealt with a preliminary, incidental matter not affecting the principal merits of the case.

[16] *Market St. Ry. Co. v. R. R. Commission of California* (1945), 324 U. S. 548, 551; 89 L. Ed. 1171, 1176, 65 S. Ct. 770; *Richfield Oil Corp. v. State Board of Equalization* (1946), 329 U. S. 69, 72, 91 L. Ed. 80, 87, 67 S. Ct. 156.

[17] *Richfield Oil Corp. v. State Board of Equalization*, supra.

[18] *Department of Banking v. Pink* (1942), 317 U. S. 264, 268, 87 L. Ed. 254, 257, 63 S. Ct. 233; *Gospel Army v. Los Angeles* (1947) 331 U. S. 543, 547, 91 L. Ed. 1662, 1665, 67 S. Ct. 1428; *Market Street Ry. Co. v. R. R. Commission*, supra.

charge, the other division of the Georgia Supreme Court's opinion denying the constitutional claim as to the Grand Jury was settled once and for all. It was expressly so held on the second appeal, for the Supreme Court declared:[19]

> "In the first appearance of this case (Reece v. State, 210 Ga. 578, 82 S. E. 2d 10), this court ruled that the accused failed to raise objections to the competency of the grand jurors before the indictment was found against him and, therefore, the lower court did not err in denying his motion to quash the indictment for this reason; hence the attempt to again challenge the array of grand jurors and to quash the indictment upon the same ground must fail, as this question has already been adjudicated adversely to the defendant, and the court did not err in sustaining the demurrer thereto."

This was not a rule concocted by the Georgia Court solely for this case. In *Russell v. Mohr-Weil Lumber Co.*, 115 Ga. 35(3), 14 S. E. 275, it was said:

> "It is proper for a trial judge, upon a new trial which this court has ordered, to treat its rulings upon all questions passed upon here as decisive thereof, and *highly improper for counsel to again bring up those questions in the same case.*"

Even where the ruling of the appellate court was erroneous, and later overruled in a different case, it is nevertheless binding on the parties thereto upon retrial;[20] likewise, on a second appeal, the law of the

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[19] *Reece v. State*, 211 Ga. 339, 85 S. E. 2d 773.

[20] *Walker v. Rowe et al*, 41 Ga. App. 769 (2), 154 S. E. 722.

case as fixed by the first appeal is binding.[21]

In the same spirit of candidness which motivated petitioner to point out the questionable jurisdiction of this Court to review the grand jury question,[22] we feel constrained to refer to the case of *Georgia Railway & Power Co. v. Decatur* (1923); 262 U. S. 432, 435-437, 67 L. Ed. 1065, 1072-1073, 43 S. Ct. 615. In that case, a like contention was made with respect to the Georgia Supreme Court's ruling, on the first appeal, as to the propriety of granting an interlocutory injunction, but this Court held that irrespective of what may have been the ruling of the State appellate court as to its power on a second appeal, this did not affect the jurisdiction of this Court to review a judgment manifestly not final. The obvious distinction between the Decatur case and the instant case lies in the fact that rulings on interlocutory injunctions have traditionally and consistently been held to be not final. The peculiar nature of equitable relief and equitable procedures places that case on an entirely different footing from the instant one; on interlocutory injunction hearings, the issues quite frequently are the same ones eventually passed on at the final trial, but the scope of the proceeding is usually much more restricted, sometimes being confined solely to a hearing upon affidavits with the result that the situation remains fluid, subject to a different disposition upon the final hearing where the matters are more thoroughly considered. On the other hand, the ruling of an appellate court on an indictment fixes the status once and for all, and constitutes an adjudication that will

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[21] *Elyea, Inc. v. Cenker*, 184 Ga. 179 (2); 190 S. E. 585; *Walden v. Nichols*, 204 Ga. 532, 534(2), 50 S. E. 2d 105; *Manning v. Carroll*, 206 Ga. 158(2), 56 S. E. 2d 278.

[22] See the petition for certiorari, page 6.

control, without deviation, the course of all subsequent proceedings, however labyrinthine their paths may be. When the Court ruled upon the validity of the indictment, there was nothing else to consider in this respect—there was no chance that subsequent events might affect the case so as to change the application of this holding. This position is supported by the case of *Carondelet Canal & Navigation Co. v. Louisiana* (1914), 233 U. S. 362, 58 L. Ed. 1001, 34 S. Ct. 627, where a decision of a state appellate court, reversing its trial court, and disposing of the only federal question involved in the case was held subject to review, notwithstanding the fact that the case was remanded for further disposition on a non-federal issue.

Even should we assume, however, that the *Decatur* case, supra, is not distinguishable from the the instant one, it is submitted that the former is no longer controlling in view of the recent decision of *Johnson v. Muelberger* (1951), 340 U. S. 581, 583, 95 L. Ed. 552, 555, 71 S. Ct. 474. In the latter case a daughter of a decedent sought to attack in New York Court the validity of her father's divorce which had been obtained in Florida, the contention being that jurisdiction was lacking in the Florida Court due to failure of compliance with applicable residence requirements. The New York trial court sustained a demurrer to the petition, but the highest appellate court of the state reversed, and remanded the cause to the trial court below for further proceedings. In holding that this judgment was nonetheless final, this Court declared:

> "But in light of the record before us we assume that the requirement of Florida for a residence of 90 days as a jurisdictional basis for a Florida divorce *is no longer open as an issue upon return of these proceedings to the Surrogate's Court.* Ac-

cordingly the judgment under review is a final decree." (emphasis supplied)

Similarly, in *Pope v. Atlantic Coast Line R. Co.* (1953) 345 U. S. 379, 97 L. Ed. 1094, 73 S. Ct. 749, the general rule was recognized that a judgment of the highest state appellate court reversing a judgment below sustaining a demurrer would not be final so as to be reviewable, but it was held that where the demurrer raised a federal question controlling as to one issue, the requisite degree of finality would be satisfied although the decision of the state appellate court did not end the litigation. For a somewhat similar holding, see *Richfield Oil Co. v. State Board of Equalization* (1946), 329 U. S. 69, 91 L. Ed. 80, 67 S. Ct. 156.

Lastly, *Clark v. Williard* (1934) 292 U. S. 112, 117, 78 L. Ed. 1160, 54 S. Ct. 615, has generally been recognized as representing a departure by this court from the old rule that the "face of the judgment" alone would be looked to in determining finality.[23] This case held that the opinion of the state court could also be considered.

The statute limiting this Court's appellate jurisdiction to the review of "final" judgments seeks to avoid "piecemeal" litigation,[24] or the appealing of a case in fragments.[25] To permit a litigant to stand idly by after final adjudication by the state court on an indictment and then undergo a retrial on that same indictment only to raise the same question again before this Court

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[23] See 43 Col. L. R. 1002, 1004.

[24] *Pope v. Atlantic Coast Line R. R. Co.*, supra; *Louisiana Navigation Co. v. Oyster Commission* (1912), 226 U. S. 99, 101, 57 L. Ed. 138, 33 S. Ct. 78; *Canter v. American Ins. Co.* (1830) 3 Pet. 307, 7 L. Ed. 688.

[25] *Canter v. American Ins. Co.* (1830), 3 Pet. 307, 318, 7 L. Ed. 688, 692; *Collins v. Miller* (1920) 252 U. S. 364, 370, 64 L. Ed. 616, 618, 40 S. Ct. 347.

hardly pays due respect to the salutory rule; if anything, the policy of the law is frustrated.

3. *In Any Event, No Federal Question Is Presented With Respect to the Grand Jury.*

The motion to quash shows that petitioner had been in jail under charges of rape two days prior to the time of his indictment therefor, but that he failed to challenge the array of grand jurors prior to return of the indictment. (R.19)

In holding that this question was thereby waived, and could not be raised by plea in abatement filed at the trial, the Supreme Court of Georgia declared:

> "1. When, as here the accused has been arrested for the commission of a penal offense and is committed to jail, he is apprised of the fact that his case or the charge against him will undergo grand jury investigation, and it is incumbent upon him to raise objections to the competency of the grand jurors before they find an indictment against him. Such being the instant case, the court did not err in denying the motion to quash the indictment. See Turner v. State, 78 Ga. 174; Lascelles v. State, 90 Ga. 347, 372 (16 S. E. 945, 35 Am. St. R. 216); Parris v. State, 125 Ga. 777 (54 S. E. 751); Tucker v. State, 135 Ga. 79 (68 S. E. 786); Burns v. State, 191 Ga. 60, 64 (11 S. E. 2d 350); Harris v. State, 191 Ga. 243 (5), 249 (12 S. E. 2d 64). And this rule applies whether the accused had counsel before the indictment was returned against him or not. Tucker v. State, supra." *Reece v. State*, 210 Ga. 578, 82 S. E. 2d 10.

In so holding, the Georgia Supreme Court was merely following a long line of Georgia decisions dating back as early as 1882. *Williams v. State* (1882) 69 Ga.

11 (5c); *Lee v. State* (1883) 69 Ga. 705 (1b); *Turner v. State* (1886) 78 Ga. 174 (1); *Lascelles v. The State* (1892) 90 Ga. 347, 372 (3), 16 S. E. 945, 35 Am. St. R. 216; *Fisher, et al v. State* (1894) 93 Ga. 309 (1), 20 S. E. 329; *Shope v. State* (1898) 106 Ga. 226 (2), 32 S.E. 140; *Simpson v. State* (1899) 110 Ga. 249, 34 S.E. 204; *Folds v. State* (1905) 123 Ga. 167 (2), 51 S. E. 305; *Edwards v. State* (1905) 121 Ga. 590 (2), 49 S. E. 674; *Parris v. State* (1906) 125 Ga. 777 (3), 54 S. E. 751; *Tucker v. State* (1910) 135 Ga. 79 (1), 68 S. E. 786; *Brown v. State* (1910) 8 Ga. App. 397 (1), 69 S. E. 37; *Cabaniss v. State* (1910) 8 Ga. App. 129 (4), 136, 68 S. E. 849; *Tompkins v. State* (1912) 138 Ga. 465, 75 S. E. 594; *Brooks v. State* (1912) 12 Ga. App. 104, 105, 76 S. E. 765; *Evans v. State* (1915) 17 Ga. App. 120 (2), 86 S. E. 286; *Stapleton v. State* (1916) 19 Ga. App. 36, 90 S. E. 1029; *West v. State* (1917) 19 Ga. App. 142 (1), 91 S. E. 216; *Smith v. State* (1940) 62 Ga. App. 498 (1), 8 S. E. 2d 797; *Burns v. State* (1940) 191 Ga. 60 (3), 11 S. E. 2d 350; and *Hawkins v. State* (1952) 86 Ga. App. 872, 874, 72 S. E. 2d 778.

In the Tucker case, supra, the Supreme Court stated:

". . . Held, that a person accused of murder, and who was in jail awaiting indictment, but made no objection to the grand jury until after they had found an indictment against him and he had been put on trial thereunder, could not not have the indictment quashed by a plea in abatement because of the illegality of the time when the term of court was held at which the grand jurors were drawn; and this is true although the plea in abatement was interposed before pleading to the merits, and the attorney for the accused stated that he had not been employed until after the indictment had been

found, and that he and his client did not know of the irregularity until after it had been so found. *Turner v. State*, 78 Ga. 174; *Lascelles v. State*, 90 Ga. 347, 372 (16 S. E. 945, 35 Am. St. R. 216); *Folds v. State*, 123 Ga. 167 (51 S. E. 305); *Parris v. State*, 125 Ga. 777 (54 S. E. 751)."

This definitely answers petitioner's allegations that he did not know of the alleged irregularity in composition of the grand jury, and that counsel had not been appointed for him until after indictment. (R. 19, par. 4).

It is generally recognized that there are two methods of raising the objection that a grand jury returning an indictment was improperly constituted, viz.: by challenge to the array before return of the indictment, or by motion to quash the indictment before trial,[26] and while it is not disputed that some states permit the last-mentioned procedure, it seems equally clear that a majority of the jurisdictions passing upon the question are in accord with Georgia.

The following states hold that objections to the grand jury must be made before indictment.

ARKANSAS

Tillman v. State (1915) 121 Ark. 322, 181 S. W. 890.

CALIFORNIA

People v. Moice (1860) 15 Cal. 329.

People v. Arnold (1860) 15 Cal. 476.

IDAHO

State v. Corcoran (1900) 7 Idaho 220, 61 P. 1034.

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[26] *People v. Munday* (1920) 393 Ill. 191, 127 N. E. 364, cert. den. 254 U. S. 638.

INDIANA

Sisk v. State (1953) 232 Ind. 214, 110 N. E. 2d 627.

IOWA

State v. Crisinger (1923) 197 Iowa 613, 195 N. W. 998.

State v. Ingalls & King (1864) 17 Iowa 8.

MISSISSIPPI

Flowers v. State (1949) 209 Miss. 86, 41 So. 2d 352, 355 (2).

Lott v. State (1948) 204 Miss. 610 (1), 37 So.2d 782.

State v. Forbes (1924) 123 Miss. 425, 98 So. 844.

Cain v. State (1905) 86 Miss. 505, 38 So. 227.

Dixon v. State (1896) 74 Miss. 271, 20 So. 839 (4).

MISSOURI

Varble v. Whitecotton (1945) 354 Mo. 570, 190 S. W. 2d 244, 246 (3, 4).

State ex rel Graves v. Sothern (1939) 344 Mo. 14, 124 S. W. 2d 1176.

State v. Seidler (1924) 267 S. W. 424.

State v. Welch (1862) 33 Mo. 33.

NEW JERSEY

State v. Ruffu (1930) 8 N. J. Misc. 392, 150 A. 249, 252.

NEW YORK

People v. Block (1947) 74 N. Y. S. 2d 430 (2, 3) 190 Misc. 78.

People v. Scannell (1902) 75 N. Y. S. 500 (4), 37 Misc. 345.

PENNSYLVANIA

Commonwealth v. Craig (1902) 19 Pa. Super. Ct. 81.

TENNESSEE

Rivers v. State (1906) 117 Tenn. 235, 96 S. W. 956.
Ransom v. State (1906) 116 Tenn. 355, 96 S. W. 953.

TEXAS

Martin v. State (1952) 157 Tex. Cr. R. 210, 248 S. W. 2d 126.

Jones v. State (1949) 154 Tex. Cr. R. 241, 226 S. W. 2d 437 (1).

Ex Parte Traxler (1945) 148 Tex. Cr. R. 550, 189 S. W. 2d 749, 752.

Williams v. State (1943) 146 Tex. Cr. R. 294, 174 S. W. 2d 261.

Tyson v. State (1943) 146 Tex. Cr. R. 128, 171 S. W. 2d 496.

Wright v. State (1941) 143 Tex. Cr. R. 447, 158 S. W. 2d 787, 789 (1).

Winn v. State (1940) 138 Tex. Cr. R. 202, 135 S. W. 2d 118.

Armentrout v. State (1939) 138 Tex. Cr. R. 238, 135 S. W. 2d 479.

Wilson v. State (1931) 117 Tex. Cr. R. 63, 36 S. W. 2d 733, 735.

Frey v. State (1928) 109 Tex. Cr. R. 168, 3 S. W. 2d 459.

Hunter v. State (1927) 108 Tex. Cr. R. 142, 299 S. W. 437.

Walker v. State (1925) 98 Tex. Cr. R. 663, 267 S. W. 988.

Smith v. State (1924) 97 Tex. Cr. R. 6, 260 S. W. 602 (1).

Staton v. State (1923) 93 Tex. Cr. R. 356, 248 S. W. 356 (2).

Hickox v. State (1923) 95 Tex. Cr. R. 173, 253 S. W. 823, 827 (13, 14).

Anderson v. State (1913) 70 Tex. Cr. R. 250, 157 S. W. 150.

Welch v. State (1912) 66 Tex. Cr. R. 525, 147 S. W. 572, 575 (1, 2).

Smith v. State (Tex. Cr. R. 1900) 56 S. W. 54 (1).

Webb v. State (Tex. Cr. R. 1897) 40 S. W. 988.

UNITED STATES

Agnew v. United States (1897) 165 U. S. 36, 41 L. Ed. 624, 17 S. Ct. 235.

Wolfson v. United States (1900) 101 F. 430, 102 F. 134.

United States v. Butler (1877) Fed. Cas. No. 14,700 (3), 1 Hughes 457.

United States v. White (1838) Fed. Cas. No. 16,679, 5 Cranch C. C. 457.

Of course, where a defendant did not have the opportunity of challenging the grand jury, as where it was impaneled and sworn prior to commission of the offense, the objection may be raised by plea in abate-

ment or other procedure provided by the state. *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687.

The Carter case is generally held to constitute the only exception to the rule, and illustrates what is meant by language in some decisions stating that the objection could be raised after indictment where the accused did not have "an opportunity" to raise it beforehand. See *Tillman v. State* (1915) 121 Ark. 322, 181 S. W. 890; *Tyson v. State* (1943) 146 Tex. Cr. R. 128, 171 S. W. 2d 496.

Language may also be found in some of the cases previously cited herein to the effect that the objection could be raised by plea after indictment on behalf of an accused who was unaware that the grand jury was considering charges against him, but the cases almost without exception declare that where an accused was put on notice thereof, as where he had been arrested and bound over, or had been released on bond, it is incumbent that he challenge the grand jury before return of the indictment. Neither is it any excuse that the accused is in jail, as it has been held that he must request to be taken before the grand jury for the purpose of making challenge. *Sisk v. State* (1953) 232 Ind. 214, 110 N. E. 2d 627; *Walker v. State* (1925) 98 Tex. Cr. R. 633, 267 S. W. 988; *Webb v. State* (Tex. Cr. R. 1897) 40 S. W. 988.

In the instant case, the petitioner was being held in jail two days before his indictment, and judging from his past experience with the law, it is only reasonable to assume that he either knew or should have known that his case would be considered.

Moreover, the irregularity urged here is not that the grand jury indicting him was prejudiced or biased, or

that any member thereof was disqualified to act.

In *United States v. Gale* (1883) 109 U. S. 65, 27 L. Ed. 857, 859, this Court noted that an objection to the array as a whole was less serious in nature than one where some juror was disqualified, for, after stating the general proposition that objections must be made before trial, declared:

> "These remarks apply with additional force where the objection is not to the disqualification of jurors who are actually sworn upon the panel, but to the exclusion or excuse of persons from serving on the panel. A disqualified juror placed upon the panel may be supposed injuriously to affect the whole panel; but if the individuals forming it are unobjectionable, and have all the necessary qualifications it is of less moment to the accused what persons may have been set aside or excused."

It is also deemed appropriate to further discuss the Gale case insofar as it held that an objection to the grand jury need not necessarily be made before return of the indictment, but might be plead in abatement prior to trial.

To begin with, the Gale case, supra, did not involve a criminal prosecution in state court, but concerned prosecution in federal court, and was not a holding on constitutional grounds, but was simply a holding that as a matter of practice in the federal courts in federal prosecutions, an accused could raise objections to the grand jury by either challenge or plea.

In fact, judging from the Court's quotation from Wharton and its approval thereof (109 U. S. at p. 72), it might be said that a plea would be available only where the accused had not had a previous opportunity of asserting his objection.

However, whatever may have been the holding of this Court in the Gale case, it was subsequently settled that objections to the array of grand jurors could not be raised after return of the indictment. In *Agnew v. United States* (1897) 165 U. S. 36, 41 L. Ed. 624, 627, 17 S. Ct. 235, the defendant filed a plea in abatement five days after return of the indictment, but before trial.

In holding that the objection should have been made earlier, this Court declared:

> "One of these rules is that the defendant must take the first opportunity in his power to make the objection. Where he is notified that his case is to be brought before the grand jury, he should proceed at once to take exception to its competency, for if he lies by until a bill is found, the exception may be too late; but where he has had no opportunity of objecting before bill found, then he may take advantage of the objection by motion to quash or by plea in abatement, the latter in all cases of contested fact being the proper remedy. *United States v. Gale*, 109 U. S. 65 [27: 857]."

However, irrespective of what the rule may or may not be in federal prosecutions, the ruling of a state court as to the required manner of challenging the grand jury based on racial discrimination is binding on this Court. *Tarrance v. Florida* (1903) 188 U. S. 519, 47 L. Ed. 572, 23 S. Ct. 403.

The ruling of the state court having been based on a question of state procedure, there is no federal question. *Thorington v. City Council of Montgomery* (1893) 147 U. S. 490, 37 L. Ed. 252, 13 S. Ct. 394; *Hartford Life Ins. Co. v. Johnson* (1919) 249 U. S. 490, 492, 63 L. Ed. 722, 724, 39 S. Ct. 336; *Edleman v. California* (1953)

344 U. S. 357, 358, 97 L. Ed. 387, 391, 73 S. Ct. 293.

Of course this is not to say that the sufficiency of the allegations to properly raise a constitutional claim is not a federal question,[27] but the *time* and *mode* are determined solely by state procedure.[28]

Although no due process question was raised at any stage of the proceedings below attacking the requirement of Georgia law that objections to the grand jury be raised before return of the indictment, and consequently is not before this Court,[29] it goes without saying that a rule of law which has been applied so long by so many courts, including this Court, could hardly be considered violative of the "fundamental fairness essential to the very concept of justice,"[30] or those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as law of the land."[31]

It must never be forgotten that a state is free to regulate the procedure of its courts in accordance with its own conception of policy unless in so doing it offends "some principle of justice so rooted in traditions and

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[27] *Carter v. Texas* (1900) 177 U. S. 442, 44 L. Ed. 839, 20 S. Ct. 687; *Rogers v. Alabama* (1904) 192 U. S. 226, 48 L. Ed. 417, 24 S. Ct. 259.

[28] *Layton v. Missouri* (1902) 187 U. S. 356, 47 L. Ed. 214, 23 S. Ct. 137; *Jacobi v. Alabama* (1902) 187 U. S. 133, 47 L. Ed. 106, 23 S. Ct. 48; *Baldwin v. Kansas* (1889) 129 U. S. 52, 32 L. Ed. 640, 9 S. Ct. 193; *Young v. Ragen* (1949) 337 U. S. 235, 93 L. Ed. 1333, 69 S. Ct. 1073; *Hardware Dealers Insurance Co. v. Glidden Co.* (1931) 284 U. S. 151, 158, 76 L. Ed. 214, 219, 52 S. Ct. 69; *Grand Rapids and Indiana Railroad Co. v. Butler* (1893) 159 U. S. 87, 40 L. Ed. 85, 15 S. Ct. 991; *Barbour v. Georgia* (1919) 249 U. S. 454, 63 L. Ed. 704, 39 S. Ct. 316; *Nevada-California, Oregon Railway Co. v. Burris* (1917) 244 U. S. 103, 61 L. Ed. 1019, 37 S. Ct. 576.

[29] *Hedgebeth v. North Carolina* (1948) 334 U. S. 806, 92 L. Ed. 1739, 68 S. Ct. 1185; *Foster v. Illinois* (1947) 332 U. S. 134, 91 L. Ed. 1955, 67 S. Ct. 1716.

[30] *Lisenba v. California* (1941) 314 U. S. 219, 236, 86 L. Ed. 166, 62 S. Ct. 280.

[31] *Hebert v. Louisiana* (1926) 272 U. S. 312, 316, 71 L. Ed. 270, 47 S. Ct. 103.

conscience of the people as to be ranked fundamental";[32] or "implicit in the concept of ordered liberty";[33] and due process is not violated simply because another mode of procedure may seem fairer or wiser or give a surer promise of protection.[34]

4. *No Denial of Equal Protection Arises from Appointment of the Jury Commissioners.*

This novel contention is asserted by petitioner at pages 15-17 of his brief.

The Georgia code provides for appointment by the judge of the superior court[35] of "six discreet persons" to serve as jury commissioners, whose duty it is to prepare the jury boxes from which the names of grand and petit jurors are selected.[36]

The jury commissioners themselves do not try cases, or in any way pass upon the guilt of an accused, and it logically follows that whether or not a Negro ever served on the jury commission is immaterial with respect to a Negro charged with a criminal offense. The latter's only interest is assurance that members of his race have not been systematically and arbitrarily excluded from the juries indicting and trying him. The

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[32] *Brown v. Mississippi* (1936) 297 U. S. 278, 285, 80 L. Ed 682, 686, 56 S. Ct. 461.

[33] *Palko v. Connecticut* (1937) 302 U. S. 319, 325, 82 L. Ed. 288, 292, 58 S. Ct. 149.

[34] *Snyder v. Massachusetts* (1934) 291 U. S. 97, 106, 78 L. Ed. 674, 677, 57 S. Ct. 330.

[35] Ga. Code Ann., §59-101. "There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners."

[36] Ga. Code Ann., §§59-106, 59-108.

nature of this right was expressly defined by this Court in *Martin v. Texas* (1906) 200 U. S. 316, 50 L. Ed. 497, 26 S. Ct. 338, viz.:

> "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

Just as the mere fact that Negroes have not served on a jury does not by itself show discrimination,[37] *a fortiori*, the mere fact that no Negroes served on the Board of Jury Commissioners does not show discrimination, since it cannot be assumed that an all-white jury commission is incapable of selecting jurors without regard to race or color.

If this contention of petitioner be sound, it necessarily follows that he is denied equal protection by whatever decision this Court renders, since no Negro has ever been appointed to the Supreme Court by any President.

Similarly, it could be said with equal force that a Negro could not be tried under any Georgia law, since the Legislatures enacting those laws have not had any Negro members since the Reconstruction Period.

There is a good reason why an individual charged with crime is afforded the right to demand that members of his race be not arbitrarily excluded from jury service, which is found in the traditional notion that a

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[37] *Ex Parte Virginia* (1880) 100 U. S. 313, 322, 25 L. Ed. 667, 671; *Martin v. Texas* (1906) 200 U. S. 316, 319, 50 L. Ed. 497, 26 S. Ct. 338; *Thomas v. Texas* (1909) 212 U. S. 278, 53 L. Ed. 512, 29 S. Ct. 393; *Franklin v. South Carolina* (1916) 218 U. S. 167, 54 L. Ed. 985, 30 S. Ct. 640.

person should be tried by his peers, which in our classless society means "a fair cross-section of the community." *Ballard v. United States* (1946) 329 U. S. 187, 191, 91 L. Ed. 181, 184, 67 S. Ct. 261. Obviously, this same consideration does not apply to jury commissioners.

Neither did this Court hold otherwise in *Hernandez v. Texas* (1945) 347 U. S. 475, 98 L. Ed. 866, 74 S. Ct. 667. That decision turned upon a finding with respect to jurors themselves.

The Georgia law does not itself declare that Negroes are not qualified jury commissioners, but leaves it a matter of discretion with the judge of the superior court as to whom he will appoint.

In *Marbury v. Madison* (1803) 1 Cranch 137, 167, 2 L. Ed. 60, 70, it was recognized that the power to appoint public officials is a political function resting in the discretion of the person having the responsibilty of exercising it, and in *Snowden v. Hughes* (1944) 321 U. S. 1, 7, 88 L. Ed. 497, 502, 64 S. Ct. 397, reh. den. 321 U. S. 804, it was held that "an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause."

Therefore, if an aspirant to an office could not complain, it hardly comports with common sense to say that petitioner stands in a better position to raise the question.

Whether any given person shall be employed by the state is in the sound discretion of state officials, and so long as the law itself does not undertake to control that discretion, as where, for example, the law expressly prohibits employment of any designated race of persons, no complaint can validly be made. *Alston v.*

School Board of Norfolk (1940 CA 4th) 112 F 2d 992, 130 ALR 1506.

Should this Court undertake to control the discretion of public officials in the exercise of their appointing power so as to determine in every given situation whether or not the appointment had been made without regard to color, it would constitute an unwarranted venture into the field of politics, both on the state and national level, since all public appointments, to a more or less degree, are made with these considerations in mind.

Although we are told in emphatic tones that the Negro will never participate in the administration of justice on an equality with white persons until his race is represented on the commissions, this statement apparently overlooks the multitude of decisions emanating from this Court in the past several decades which has fully protected the rights of every citizen complaining of discrimination.

Moreover, as was said in *Ownbey v. Morgan* (1921) 256 U. S. 94, 110-112, 65 L. Ed. 837, 846, 41 S. Ct. 433:

> "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement, and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, . . ."
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> * * *
>
> "However desirable it is that the old forms of procedure be improved with the progress of time,

it cannot rightly be said that the 14th Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."

VI.

CONCLUSION

For the foregoing reason, the decision of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,

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